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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 584th MEETING

Held at Headquarters, New York,
on Tuesday, 28 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 3.20 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/418)

Paragraphs 6 and 7

1. Mr. HOLTZMANN (United States of America) said that the Commission needed to decide between variant 1 (para. 6) and variant 2 (para. 7). His delegation felt that variant 2 was preferable because in most cases the Notes would be used in two-party arbitration and there would be no need to spend time reading about the difference between two-party arbitration and multi-party arbitration. Variant 2 clearly directed the minority involved in multi-party cases to the section of the Notes that dealt with its special concerns and made it clear to the majority that it need not consider the somewhat complex concepts of variant 1.

2. Mr. HUNTER (United Kingdom), supported by Mr. TELL (France) and Mr. FERRARI (Italy), said that variant 2 was preferable; variant 1 was too detailed to be included in the introductory section.

3. Mr. GRIFFITH (Australia) and Mr. ABASCAL (Mexico) said that they also favoured variant 2.

4. Paragraph 6 was deleted.

5. Paragraph 7 was adopted.

Paragraphs 8 to 10

6. Mr. HOLTZMANN (United States of America) suggested that in paragraph 9, the words "or other electronic means" should be added after the words "telefax or conference telephone calls" so as to conform with paragraphs 37 and 38 and to recognize that in the modern world there were other electronic means than those mentioned in the paragraph.

7. Mr. HUNTER (United Kingdom) said that he supported that proposal.

8. Mr. CHOUKRI (Observer for Morocco) said that the Arabic version of paragraph 9 referred to a single meeting, rather than "one or more meetings", and must be brought in line with the other language versions.

9. Paragraphs 8 to 10, as amended, were adopted.

Paragraphs 11 to 14

10. Mr. HOLTZMANN (United States of America) said that in paragraph 14, it would be useful to add the words "by other provisions agreed to by the parties" after the words "arbitration rules", since the parties might have side agreements, or provisions in their contracts, relating to the conduct of the arbitration, which would limit the discretion of the arbitral tribunal.

11. Mr. GRIFFITH (Australia) and Mr. FERRARI (Italy) said that they supported that proposal.

12. Paragraphs 11 to 14, as amended, were adopted.

Paragraphs 15 to 17

13. Mr. CHOUKRI (Observer for Morocco) said his delegation felt that the reference in paragraph 15 to securing the agreement of the arbitral institution should be deleted since it was up to the parties to choose the arbitration rules, and they would not necessarily be the rules of the arbitral institution.

14. Mr. SEKOLEC (International Trade Law Branch) said that that point had been considered at some length at the previous session. The reference was to the agreement of the arbitral institution concerning the performance of the functions of that institution, and not to the permission of the institution to use its rules. The wording was recorded in paragraph 332 of the Commission's report on the work of its twenty-eighth session (A/50/17).

15. Mr. HUNTER (United Kingdom) said that the problem could be solved by changing the word "would" to "may"; that would cover other eventualities as well as the point made by the observer for Morocco.

16. Mr. TELL (France) said that. as in the case of paragraph 4, paragraph 17 needed to be amended to reflect the fact that in some legal systems, there was no requirement that international arbitration should be subject to national law.

17. Mr. SEKOLEC (International Trade Law Branch) suggested the wording "... on the basis of provisions of law that may govern the arbitral procedure ...". That would cover all cases, including cases where there was no national law governing the arbitral procedure, while not confusing the issue in cases where such a law did exist.

18. Mr. TELL (France) and Mr. HUNTER (United Kingdom) said that they could accept that wording.

19. Paragraphs 15 to 17, as amended, were adopted.

Paragraphs 18 to 21

20. Mr. FERRARI (Italy), referring to paragraph 19, said that the examples of documents which might not need to be translated or might have to be translated only in part should be deleted so as not to discourage arbitrators from having translations made. The sentence would then read "In the interest of economy, some documents might not need to be translated, or may have to be translated only in part."

21. Mr. HOLTZMANN (United States of America) said that paragraph 20 should make a distinction between simultaneous and consecutive interpretation, since the choice of method had implications in terms of cost and time: consecutive interpretation was cheaper, but it doubled the length of a hearing. The

question needed to be considered at an early stage because it had an impact on scheduling and on deposits for costs.

22. Mr. ABASCAL (Mexico), referring to paragraph 19, said that conflicts might arise in cases where one of the parties submitted documents in a language other than the language of the proceedings. In such cases, the arbitrators might request the party concerned to provide a translation; the other party might not be satisfied with the translation, and might wish to submit an alternative version. He therefore suggested that the paragraph should include a sentence to the effect that the parties should consider the possibility of conflicts between translations provided by the parties or between translation methods proposed by them. The final wording could be left to the secretariat.

23. With regard to paragraph 20 his delegation supported the United States proposal.

24. Mr. TELL (France), referring to paragraph 19, suggested that in the French version, the word "législation" in the third sentence should be replaced by "règles de droit".

25. Mr. FARIDI ARAGHI (Islamic Republic of Iran), referring to paragraph 19, said that his delegation supported the Italian proposal. As to the concern expressed by the representative of Mexico, conflicts might be avoided if the text referred to "official translations", as that term implied that the translations would be made by licensed individuals.

26. Mr. GRIFFITH (Australia) said that his delegation had no objection to amending the last sentence of paragraph 19 to read "Some documents may not need to be translated or may have to be translated only in part."

27. Mr. CHOUKRI (Observer for Morocco) said that his delegation did not support deletion of the examples in paragraph 19; it did, however, favour deletion of the words "or commentaries in the final brackets", as "commentaries" was a very broad term.

28. Mr. FERRARI (Italy) said that the comments by the representative of Mexico related not only to conflicts involving translation and interpretation, but to broader issues, such as that of expert opinions presented by the parties.

29. The CHAIRMAN suggested that the Commission should revert to the Mexican proposal at a later time. She took it that the Commission wished to delete the bracketed portions of paragraph 19, as proposed by the representative of Italy.

30. It was so decided.

31. Paragraphs 18, 20 and 21 were adopted.

Paragraphs 22 to 24

32. Mr. GRIFFITH (Australia), referring to paragraph 23, suggested that the term "support services" should be changed to "administrative services".

33. Mr. HOLTZMANN (United States of America) said that his delegation could not accept the Australian proposal, as administrative services in the context of arbitration typically referred to the services provided by an arbitral institution, while support services included the availability of local counsel, secretarial services and a variety of other services that did not fall within the purview of an arbitral institution.

34. Mr. GRIFFITH (Australia) withdrew his delegation's proposal.

Paragraphs 22 to 24 were adopted.

Paragraphs 25 to 28

35. Mr. ABASCAL (Mexico) said that the second sentence of paragraph 25, which began with the phrase "When the parties have submitted the case to an arbitral institution, ...", should be amended, as parties did not submit a case to an arbitral institution, but to arbitral proceedings supervised by an institution.

36. Mr. HOLTZMANN (United States of America) said that his delegation welcomed the comments by the representative of Mexico. The sentence could perhaps be amended to read "When an arbitral institution is involved in a case ...".

37. Mr. CHOUKRI (Observer for Morocco) suggested that, in view of the financial implications of engaging a secretary, paragraph 26 might stipulate that the parties should engage a secretary to provide administrative services for the tribunal.

38. Mr. HUNTER (United Kingdom), said that the wording of the last two sentences of paragraph 28 provided too much encouragement to those who felt that the functions of an arbitrator could be delegated to the secretary of the tribunal. The general view in the international community was that an arbitral tribunal could not delegate its essential decision-making function. He therefore suggested that the following sentence should be added at the end of the paragraph: "However, it is typically recognized that it is important to ensure that the secretary does not usurp the decision-making functions of the arbitral tribunal."

39. Mr. HOLTZMANN (United States of America) supported by Mr. ABASCAL (Mexico), welcomed the United Kingdom proposal.

40. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation did not see the need for the proposed amendment as the secretary's functions would be carried out under the supervision of the arbitral tribunal, and the secretary would thus be unable to usurp the tribunal's functions.

41. Mr. GRIFFITH (Australia) proposed deleting the last two sentences of paragraph 28 and inserting a short sentence emphasizing that the secretary should never usurp the decision-making functions of the arbitral tribunal.

42. Mr. TELL (France) endorsed the proposal of the United Kingdom.

43. Mr. HERRMANN (Secretary of the Commission) said that since the secretary carried out tasks under the direction of the arbitral tribunal, as indicated in paragraph 27, paragraph 28 should specify that, while some tasks might be delegated to the secretary, they should never include any decision-making functions. He suggested that a more neutral term should be used to replace the verb "usurp", such as "perform" or "carry out".

44. The CHAIRMAN said that if she heard no further comments she would take it that the Commission agreed to let the secretariat provide appropriate wording for paragraph 28.

45. It was so decided.

46. Paragraphs 25 to 28, as amended, were adopted.

Paragraphs 29 to 31

47. Mr. LEBEDEV, referring to paragraph 30, which dealt with the management of deposits, proposed that the words "taking into account the nature of such deposits" should be inserted at the end of the second sentence to cover situations such as deposits which were exempt from taxation.

48. The CHAIRMAN said that if she heard no further comments she would take it that the Commission wished to adopt paragraphs 29 to 31 as originally drafted.

49. Paragraphs 29 to 31 were adopted.

Paragraphs 32 and 33

50. Mr. CHOUKRI (Observer for Morocco), referring to paragraph 33, which dealt with confidentiality, proposed that the references to the identity of arbitrators and to the content of the award should be deleted. The identity of arbitrators was generally public information and the content of awards was an aspect of jurisdiction; accordingly, the parties should not be encouraged to keep such matters confidential.

51. Mr. GRIFFITH (Australia) said that the first sentence in paragraph 32 could be incorrectly construed to mean that confidentiality was an essential aspect of arbitration which, in fact, it was not in all jurisdictions. The draft Notes should state in broader terms that the issue of confidentiality could be dealt with expressly by the parties or covered in the applicable arbitral rules, but that in the absence of a specific arbitral rule, parties should not assume that the obligation of confidentiality was implied. Parties should consider the issue before the arbitration began and make specific provisions for confidentiality if they so desired.

52. Mr. HUNTER (United Kingdom) agreed that the draft Notes should encourage parties to consider the need for an agreement on confidentiality.

53. Mr. HOLTZMANN (United States of America) agreed that the parties should be advised that confidentiality was not necessarily assured and that they had to make specific agreements. He proposed that a small drafting group should review

the issue of confidentiality and that discussion of the matter should be deferred.

54. Mr. HERRMANN (Secretary of the Commission) said it would be helpful if the Commission provided further guidance on the matter of confidentiality, which continued to be an important topic of discussion in arbitration circles. For the purposes at hand, however, it would be sufficient to indicate that in the absence of express rules for confidentiality, parties should not assume the existence of an implied confidentiality recognized by courts in all jurisdictions. If parties wished to include an agreement on confidentiality, they could proceed in accordance with the guidelines in paragraph 33.

55. The CHAIRMAN said that the secretariat would provide a final draft of paragraph 33.

56. Paragraphs 32 and 33 were adopted.

Paragraphs 34 and 35

57. Paragraphs 34 and 35 were adopted.

Paragraphs 36 to 38

58. Mr. FERRARI (Italy) said that his delegation objected to the negative implications in paragraph 36 regarding the use of telefax. He suggested that the paragraph should be deleted or redrafted.

59. Mr. HOLTZMANN (United States of America), agreeing with the representative of Italy, proposed to delete the word "while" in the first sentence of paragraph 36 so that it would read "The use of telefax in arbitration proceedings offers many advantages over traditional means of communication." The next sentence might then begin with the words "It is, nevertheless, advisable ..." and continue as drafted. He further proposed that the phrase "in light of those considerations" should be deleted from the next sentence so that it began "It might be decided that ..." and continue with no further changes. In that way, the paragraph would endorse the use of telefax but would also mention the necessary precautions to be taken with regard to equipment.

60. Mr. ABASCAL (Mexico) supported the United States proposal and suggested that the reference in the first sentence to "the advisability of considering whether the equipment used offered satisfactory security" should be deleted in order to avoid any confusion.

61. Mr. GRIFFITH (Australia) said that the paragraph should be as short as possible to avoid confusion and ensure that it encouraged rather than discouraged the use of telefax. He proposed that the secretariat should provide the precise wording of paragraph 36.

62. Mr. TELL (France) supported the proposal of Italy and the deletion of the second part of the first sentence as well as the second sentence.

63. Referring to paragraph 38, he said that the phrase "to avoid technical difficulties" was misleading, since no suggestions for avoiding such difficulties were provided in the paragraph.

64. Mr. ABASCAL (Mexico) said that, if paragraph 36 was retained, his delegation would prefer the wording proposed by the delegation of the United States of America for the first sentence; it reflected a more positive attitude to the use of telefax.

65. Mr. HUNTER (United Kingdom) said that since the use of telefax gave rise to specific problems, paragraph 36 should not be deleted. His delegation favoured the wording proposed by the representative of the United States of America. He agreed with the representative of Mexico that the second sentence should be deleted, and suggested that the third sentence could be left to the secretariat to redraft as appropriate.

66. Mr. FERRARI (Italy) agreed that the first sentence of paragraph 36 should be reworded in a more positive way.

67. Mr. TELL (France) supported the remarks by the representatives of Mexico and Italy and added that if the second sentence was retained, it would be inappropriate to warn against the use of telefax for certain types of documents.

68. The CHAIRMAN said that paragraph 36 would be redrafted accordingly, and that the revised English text would be made available at the following meeting.

69. Paragraphs 36 to 38, as amended, were adopted.

Paragraphs 39 to 42

70. Paragraphs 39 to 42 were adopted.

Paragraph 43

71. Mr. HOLTZMANN (United States of America) proposed that the following subparagraph should be added at the end of the paragraph: " - the method by which submissions will be made, e.g. whether on paper or by electronic means, or both (see also paras. 36 to 38)".

72. Mr. GRIFFITH (Australia) suggested that it was already implicit in the guidelines that submissions could be made by electronic means. Moreover, the wording of the new subparagraph did not sit well with the rest of the paragraph.

73. Mr. FERRARI (Italy) supported the proposal of the United States of America.

74. Mr. HOLTZMANN (United States of America) said that the increasing availability and use of electronic means should be recognized in the text. Any necessary redrafting of the paragraph should be left to the secretariat.

75. The CHAIRMAN said that the paragraph would be redrafted accordingly.

76. Paragraph 43, as amended, was adopted.

The meeting rose at 6 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 585th MEETING

Held at Headquarters, New York,
on Wednesday, 29 May 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/423)

Paragraphs 44 to 47

1. Mr. HOLTZMANN (United States of America) suggested that a new sentence should be added at the end of paragraph 44, reading "The terms of reference required under some arbitral rules or agreements of the parties may serve this same purpose."

2. Mr. TELL (France) said that the practice of preparing lists of points at issue, referred to in paragraph 44 was falling out of favour with practitioners. He suggested that the words "risk of a subsequent ultra petita or infra petita objection to the award" should be added to the disadvantages cited in the text.

3. Mr. ABASCAL (Mexico) expressed his support for both the United States proposal and the French proposal.

4. Mr. TELL (France) suggested that in the French text of paragraph 47, the word "recours" should be replaced by "action".

5. Mr. SANDOVAL LÓPEZ (Chile) said that a similar problem existed in the Spanish text, where the words "reparación" and "remedio" should be replaced by "acción".

6. Mr. ABASCAL (Mexico), supported by the CHAIRMAN, said that since the word "acción" had a specific technical meaning in several Latin American countries, it might be inappropriate to use it in paragraph 47.

7. Mr. SANDOVAL LÓPEZ (Chile) said there was nevertheless a need to make it clear that what was being sought was not always a relief or remedy, but rather some action on the part of the tribunal.

8. Mr. HERRMANN (Secretary of the Commission), supported by Mr. ABASCAL (Mexico) and Mr. TELL (France), suggested the adoption of the wording used in other Commission documents, where the phrase "relief or remedy sought" had been translated into French as "l'objet de la demande" and into Spanish as "el objeto de la demanda".

9. Mr. LEBEDEV (Russian Federation) observed that paragraph 47 appeared to concern only the claims of the claimant, and not those of the defendant, and that the secretariat should clarify the draft by avoiding the use of the words "their claims".

10. Mr. HOLTZMANN (United States of America) suggested that, for reasons of clarity and accepted usage, the word "defendant" at the end of paragraph 46 should be replaced by "a party".

11. Paragraphs 44 to 47, as amended, were adopted.

Paragraph 48

12. Mr. GRIFFITH (Australia) suggested that paragraph 48 should indicate more clearly the need for the consent of all parties to the disclosure to the arbitrator of any information relating to the possibility and status of settlement negotiations.

13. Mr. HERRMANN (Secretary of the Commission) said that the purpose of the Notes was not to lay down rules for the parties to arbitration proceedings, but rather to serve as an annotated checklist for the arbitrators. He therefore preferred to preserve the minimalist character of the paragraph as currently drafted.

14. Mr. ABASCAL (Mexico) expressed doubts about the appropriateness of the Australian proposal. Some negotiation agreements might require both parties to provide information to the arbitrators, while others might stipulate confidentiality. The complexity of the problem was beyond the scope of the current paragraph.

15. Mr. HUNTER (United Kingdom) said that in view of the complexity of the issues involved, his delegation also preferred the minimalist approach of the current text.

16. Paragraph 48 was adopted.

Paragraphs 49 to 55

17. Mr. SANDOVAL LÓPEZ (Chile) suggested that part of paragraph 50 should be moved to paragraph 52, so that the first part of the latter paragraph would read "The arbitral tribunal may wish to establish time-limits for the production of documents. In that case, evidence submitted late will as a rule not be accepted."

18. The CHAIRMAN said she took it that the Commission preferred the current text of paragraphs 49 and 50.

19. Mr. HOLTZMANN (United States of America) suggested that, for consistency with other provisions, the words "or electronic message" should be added after the word "telefax" in paragraph 53 (b).

20. Mr. TELL (France) said that while his delegation had no objection to the United States proposal, it found the second part of paragraph 53 to be questionable and too formalistic. As currently drafted, the paragraph appeared to encourage parties to challenge the introduction of documentary evidence.

21. The CHAIRMAN said she took it that the Commission preferred to retain the current wording of paragraph 53, with the addition suggested by the United States representative.

22. Mr. HOLTZMANN (United States of America) suggested that the last sentence of paragraph 54 should be revised to include a reference to a document-numbering system.

23. Mr. HERRMANN (Secretary of the Commission) said that specific reference to a document-numbering system had already been made in paragraph 43, and asked whether a joint set of documents would require a separate numbering system distinct from those already used by the parties to the proceeding.

24. Mr. HOLTZMANN (United States of America) said that perhaps paragraph 43 could be broadened to include a more direct reference to a document-numbering system.

25. Mr. LEBEDEV (Russian Federation) suggested that, in paragraph 43, "a system for numbering items of evidence" should be amended to read "a system for numbering items of evidence and other documents".

26. The CHAIRMAN said she took it that the Commission accepted the amendment suggested by the representative of the Russian Federation.

27. Mr. HUNTER (United Kingdom) said that, the word "findings" in the second sentence of paragraph 55 implied that a decision had been taken. His delegation therefore considered that "findings" should be replaced by a more neutral word, such as "material".

28. The CHAIRMAN said that, if the members of the Commission agreed, the word "findings" in the English text would be replaced by the word "information".

29. Paragraphs 49 to 55, as amended, were adopted.

Paragraphs 56 to 59

30. Mr. HOLTZMANN (United States of America), supported by Mr. HUNTER (United Kingdom), proposed that, in paragraph 58, the words "arrangements so that all parties have the opportunity to be present" should be inserted after the words "matters such as timing,".

31. Mr. MADRID (Spain) said that the current wording of paragraph 58 already implied that measures would be taken to ensure that the arbitrators and one party would be given an opportunity to be present at an on-site inspection.

32. Mr. HUNTER (United Kingdom) said that it was not necessary to imply that the arbitral tribunal had an obligation to make arrangements. The word "arrangements" should therefore be avoided. Perhaps the words "giving the parties an opportunity to be present" would be sufficient.

33. Mr. HERRMANN (Secretary of the Commission) said that, in paragraph 58, the reference to timing and meeting places should take into account the arrangements to which the United States representative was referring. Perhaps the paragraph could be amended to include the words "with a view to ensuring that all parties have an opportunity to be present".

34. Mr. HOLTZMANN (United States of America) said that his delegation could accept the Secretary's suggestion.

35. Paragraphs 56 to 59, as amended, were adopted.

The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.

Paragraphs 60 to 69

36. Mr. HOLTZMANN (United States of America), supported by Mr. GRIFFITH (Australia) and Mr. HUNTER (United Kingdom), proposed that the following sentence should be inserted after the first sentence of paragraph 68: "In those legal systems, it is usual that such contacts are not permitted once the oral testimony of the witness has begun."

37. The CHAIRMAN asked whether the proposed amendment was necessary, considering that the first sentence of paragraph 68 specified that the interviews in question took place "prior to" the hearing.

38. Mr. CHOUKRI (Observer for Morocco) proposed, in keeping with the United States proposal, that the sentence "In some legal systems, the parties are permitted to hold meetings with witnesses prior to their appearance at the hearing" should be added at the end of paragraph 68.

39. The CHAIRMAN said that the Moroccan proposal simply reiterated what was said at the beginning of paragraph 68.

40. Mr. CHOUKRI (Observer for Morocco) said that that paragraph did not cover situations where the parties were permitted to interview witnesses after the hearing had begun but before the witnesses had given their testimony.

41. Mr. HUNTER (United Kingdom) suggested that the Moroccan proposal might be intended to cover situations where witnesses gave evidence before the hearing in the form of a deposition, which was admitted into the record of the proceedings and taken into account by the tribunal in reaching its conclusion. That situation might be too specific for inclusion in the Notes; on the other hand, the Notes should not imply anything negative about that practice.

42. The CHAIRMAN said that the situation was already covered in paragraph 66, and that referring to it again could cause confusion.

43. Mr. HOLTZMANN (United States of America) said that the words "prior to" in the first sentence of paragraph 68 did not convey his idea as explicitly as he would have liked. He suggested that, to replace his previous proposal, the secretariat of the Commission should draft a sentence specifically cautioning the parties that, in systems where witnesses could be interviewed before the hearing, such contacts were usually forbidden once oral testimony had begun.

44. The CHAIRMAN said that the secretariat would take note of the United States proposal.

45. Paragraphs 60 to 69, as amended, were adopted.

Paragraphs 70 to 74

46. Mr. FERRARI (Italy) said that the question of conflicts between different expert opinions which had been raised at the previous meeting, should be dealt with in the section currently under consideration.

47. Mr. LEBEDEV (Russian Federation) said experience had shown that experts were often unable to perform their functions without additional materials from one of the parties, and that many arbitration rules therefore stipulated that the parties must provide experts with the materials they needed to form an opinion. He proposed that the sentence "It may be useful to provide that the parties should supply the expert with the materials he requires to prepare his expert conclusion" should be inserted after the second sentence of paragraph 72.

48. Mr. HERRMANN (Secretary of the Commission) said that, with respect to the proposal by the Russian Federation, the Notes should not specify whether the request for additional materials should come directly from the expert or should be made through the tribunal, since the relevant provisions of the UNCITRAL Arbitration Rules differed from those of the UNCITRAL Model Law on International Commercial Arbitration. He asked the representative of Italy to clarify his proposal, since the Notes could not cover all situations where expert opinions contradicted one another, because the solutions to such contradictions depended on the circumstances in each case and were part of the decision-making process, which was not addressed in the Notes.

49. The CHAIRMAN said she agreed that the choice between different expert opinions was a matter for the judge to decide in each case. In any event, the last sentence of paragraph 72 dealt adequately with the evaluation of experts' reports.

50. Mr. FERRARI (Italy) said that sentence did not sufficiently address the issue because it appeared in the section on the terms of reference of experts appointed by the arbitral tribunal, and not in the section on expert opinions presented by a party.

51. The CHAIRMAN said that the differences of opinion referred to could involve either category of experts. In the absence of specific proposals, she would take it that the Commission approved paragraphs 70 to 74 as amended.

52. Mr. FERRARI (Italy) asked whether the issue he had raised would be addressed.

53. The CHAIRMAN noted that thus far no proposal had been made in that connection, not even by the Mexican delegation, which had raised the issue at the previous meeting.

54. Mr. ABASCAL (Mexico) explained that the problem he had raised concerned conflicts between translations, not conflicts between expert opinions.

55. Mr. FERRARI (Italy) pointed out that the question raised by the Mexican delegation had been postponed precisely because his delegation had suggested

dealing with conflicts between translations and conflicts between expert opinions at the same time.

56. The CHAIRMAN, said that she would take it that the Commission found the paragraphs under consideration sufficiently clear, since no specific amendments had been proposed, apart from the addition to paragraph 72 proposed by the Russian Federation. With regard to the latter proposal, she observed that it might be useful to require the parties to supply the expert with the material necessary for the discharge of his functions.

57. Mr. LEBEDEV (Russian Federation) said he agreed with the Secretary of the Commission that the wording of the addition proposed by his delegation should be extremely general and should do nothing more than clarify certain issues that arose in practice.

58. Paragraphs 70 to 74, as amended, were adopted.

Paragraphs 75 to 86

59. Mr. HOLTZMANN (United States of America) indicating that he was acting on the advice of a group of expert practitioners, suggested adding the sentence "The arbitral tribunal may wish to consult the parties on this matter" at the end of paragraph 76. He also suggested that, in paragraph 81, the words "or when no arbitration rules apply ..." should be added after "In view of such differences ...".

60. Paragraphs 75 to 86, as amended, were adopted.

Paragraphs 87 to 89

61. Mr. HOLTZMANN (United States of America) suggested moving the last sentence of paragraph 89 to the end of paragraph 87. He also suggested that the last part of the sentence should be amended to read "... can be used in multi-party as well as two-party proceedings", which shifted the emphasis.

62. Mr. TELL (France) said that the word "pluripartite" in paragraph 89 of the French text should be changed to "bilatérale" in order to be consistent with paragraph 87.

63. Mr. LEBEDEV (Russian Federation) said that a number of inaccuracies in the Russian text should be corrected.

64. Mr. HERRMANN (Secretary of the Commission) invited all delegations to make suggestions in the other official languages as well.

Paragraphs 32 and 36

65. Mr. SEKOLEC (International Trade Law Branch) read out the following amended version of paragraph 32:

> "It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer

in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the arbitration. Moreover, parties that have agreed on arbitration rules that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize a commitment to confidentiality as an implied term of the agreement. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality."

66. He also read out the following amended version of paragraph 36:

"Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a facsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should not be sent by telefax or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided the document itself is received within a reasonable time thereafter."

The meeting rose at 1.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 586th MEETING

Held at Headquarters, New York,
on Wednesday, 29 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued)

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

96-80682 (E)

The meeting was called to order at 3.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/423)

1. Mr. HERRMANN (Secretary of the Commission) suggested that, pursuant to the discussion at previous meetings, the Commission might wish to make a number of drafting changes to the draft Notes on Organizing Arbitral Proceedings (A/CN.9/423). He therefore proposed to read out the changes as formulated by the secretariat.

2. Paragraph 19 would read: "Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings." The title of section 10 would read: "Practical details concerning written submissions and evidence (e.g., method of submission, copies, numbering, references)", and paragraph 43 would read: "Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- whether the submissions will be made as paper documents or by electronic means, or both (see above, paras. 36-38);

- in case of paper-based submissions, the number of copies in which each document is to be submitted;

- a system for numbering documents and items of evidence, and a method for marking them, including by tabs;

- form for reference to documents (e.g., by the heading and the number assigned to the document or its date);

- paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;

- when translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as original texts or in separate volumes".

3. Mr. ABASCAL (Mexico) said that the words "should not be sent by telefax" in the fifth line of paragraph 36 should be replaced with some less negative wording.

4. Mr. HERRMANN (Secretary of the Commission) suggested that the second sentence of that paragraph could be reworded to read: "Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a facsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain

telefax messages should be confirmed by mailing or otherwise delivering the documents whose facsimile was transmitted by electronic means."

5. Mr. GRIFFITH (Australia) suggested that the heading of section 10 should be shortened to "Practical details concerning written submissions and evidence". In addition, paragraph 43 contained too much detail, and could be replaced by the sentence "Directions should be given as to the form and format of submissions, documents and evidence." However, if the Commission preferred to retain paragraph 43 in its current form, the last subparagraph, which dealt with translations, should be deleted, since that issue had been sufficiently covered in paragraph 19.

6. Mr. CHOUKRI (Observer for Morocco) supported the proposal of the representative of Australia regarding the heading of section 10.

7. Mr. HOLTZMANN (United States of America) recalled that an effort had been made to ensure that all section headings were sufficiently explicit, so that the list of matters following paragraph 19 could stand alone. His delegation therefore opposed changing the heading of section 10. Also, his delegation did not support the changes to paragraph 43 proposed by the representative of Australia; they would result in the deletion of some very useful information.

8. Mr. GRIFFITH (Australia) said that his delegation accepted the arguments put forward by the representative of the United States of America.

9. Mr. LEBEDEV (Russian Federation), supported by Mr. FERRARI (Italy) and Mr. TELL (France), said that the new language produced by the secretariat should be retained in its current form.

10. Mr. HERRMANN (Secretary of the Commission) suggested that the Commission might wish to rename the document "UNCITRAL Notes on Organizing Arbitral Proceedings".

11. The CHAIRMAN said she would take it that the Commission wished to adopt the document as amended.

12. It was so decided.

13. Mr. LEBEDEV (Russian Federation) said that the Commission had completed a very important document which would prove most useful in the field of international commercial arbitration. He requested the secretariat to explain how it would be disseminated, particularly in business circles.

14. Mr. HERRMANN (Secretary of the Commission) said that the secretariat did not have any definite plans for publication because in the current financial situation there was no certainty as to what resources would be available. However, the secretariat would make every effort to disseminate the text as widely as possible and to determine which distribution channels should be used. As soon as the document was finalized internally it would be put on the home page, which was another way of making it widely available. If possible, the Notes would be issued in the form of a booklet, possibly with the list of issues as a separate insert. There might be some advantage in having the booklet

printed in Vienna. It would be helpful if, in its formal decision adopting the Notes, the Commission requested the Secretary-General to ensure the widest possible dissemination of the Notes; that decision would then be included in the Commission's report.

The meeting was suspended at 4 p.m. and resumed at 4.30 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (A/50/17; A/CN.9/421 and 426)

15. Mr. SORIEUL (International Trade Law Branch), introducing the draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426), recalled that, at its previous session, the Commission had adopted article 1 and articles 3 to 11, although some questions remained with regard to article 11. The title of the draft Guide had not been finalized, and that reflected uncertainties about the exact sphere of application of the Model Law.

16. In article 2, one of the questions to be resolved, which actually determined the sphere of application of the Model Law, was the definition of the term "data message". The Commission would have to determine whether that notion included not only automatic exchanges of data from computer to computer but also electronic mail, telegrams, telex and fax. There had been a detailed discussion at the previous session as to the types of fax uses the concept of a "data message" should cover. The Working Group had agreed that automated fax uses should be covered but had not been very specific about fax uses in general. Another question that arose was whether the concept covered writing.

17. There had been agreement on much of article 1, but it remained to be determined whether the sphere of application should cover domestic and international uses of modern means of communication or should be limited to the commercial area. The footnote to article 1 was based on the broad definition of the term "commercial" contained in the UNCITRAL Model Law on International Commercial Arbitration. Although the Model Law was limited to the commercial field, there were elements which made it possible to extract general rules applicable to all uses of modern means of communication in the commercial field and also in civil law and possibly administrative law.

18. Chapter II contained central provisions of the Model Law and sought to determine the functional equivalent of concepts such as "writing", "signature" and "original", as well as the legal validity of data messages. Those provisions would replace binding provisions which already existed in national laws concerning the form of certain legal transactions. Articles 5 to 7 were concentric articles, moving from simpler to more complex, and from less binding to more binding. Article 5 was not concerned with the authenticity of the content of a writing or with identification of its author but aimed to define a functional equivalent of a piece of paper. In article 6, one found rules on the functional equivalent of a signature; the functional equivalent of a signed writing was therefore a writing or electronic message that met the conditions of articles 5 and 6. Article 7 laid down more autonomous rules on the presentation of the content of the document between the time of its creation and the time it acquired legal force. Articles 8 and 9 were also binding in nature.

19. Chapter III contained provisions which were not binding and were of the type often found in contracts establishing the links between EDI users and communications agents. Article 10, a general provision, established the principle of party autonomy. Article 11 was concerned with the conditions in which the author of a data message could be legally bound by the content of a document emanating from a computer. The Commission had not been able to reach consensus on paragraph 6, which therefore remained in square brackets. It might be preferable for the Commission to start with articles 12 to 14 at the current session and then revert to the question of the sphere of application, raised in article 2.

20. Before taking up article 2, the Commission might wish to consider the text of draft article "x", annexed to the report of the Working Group on Electronic Data Interchange on the work of its thirtieth session (A/CN.9/421). Draft article "x", the text of which had been drawn up in collaboration with the Comité maritime international (CMI), would create the functional equivalent of bills of lading in maritime transport. The text would be added to the draft Model Law as article 15.

21. Article "x" would apply to maritime transport documents, not only negotiable documents but also non-negotiable sea way-bills, so that it would be possible to extend its application to all types of transport documents. The objective of the article was to settle all questions regarding the negotiability and transferability of rights. Article "x" was therefore a specific provision of transport law.

22. The Working Group proposed that draft article "x" should be placed in a separate part - Part II - of the Model Law, so that a division would be made in the text between general and specific provisions. The question then arose as to whether other specific provisions were needed; if so, the Commission could instruct the Working Group to propose provisions in respect of other negotiable documents. However, the Commission would then have to take a position on when the Model Law should be completed. If the text was to be completed at the current session, the Commission would have to decide about possible future additions to the Model Law.

23. The draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (A/CN.9/426), served as an explanatory note to the Model Law and constituted a possible source of law. Once the Commission had completed its review and adoption of the Model Law, it was the intention of the secretariat to finalize the Guide, taking into account the deliberations and decisions of the Commission. It was to be hoped that the Guide would be adopted at the same time as the Model Law so that both texts could be published concurrently. Accordingly, the Commission should provide the secretariat with any modifications to be incorporated into the final version of the Guide.

24. The question of future work on the topic of EDI was covered in chapter IV of the Working Group's report (A/CN.9/421). The Working Group, with the help of CMI, had identified questions which went far beyond the uses of EDI and electronic communications to issues of maritime law. Article "x" was concerned with the functional equivalent of bills of lading but made no mention of other

issues that could affect the rights and obligations of parties to various types of maritime transport contracts. The view had been expressed that the Commission should take up issues of maritime law and formulate more general rules on the rights and obligations of the parties concerned.

25. The Working Group had considered other possible topics for future work in the field of EDI. It had felt that the question of possible standards for digital signatures should not be taken up by the Commission because it was a technical rather than a legal matter. On issues of registries, if there was to be a system of certification and authentication of electronic communications, one of the technical solutions was to ensure uniformity of rights transferred and integrity of information transmitted through a certification authority which would have the status of a third party in relation to the parties concerned. The simplest method was to have a registry which would receive information and register the transfer of rights and would be able to provide information on the holders of registered rights. That issue needed to be considered in more detail in collaboration with the International Institute for the Unification of Private Law (UNIDROIT), which was working on the question of the registration of certain types of mobile equipment.

26. With regard to the question of incorporation by reference, the Working Group had agreed on three conditions to be met when establishing legal norms for the incorporation of reference clauses in data messages. If time permitted, it was recommended that the Commission should discuss, at its current session, the possibility of including in the Model Law a general reference to incorporation by reference.

27. Other areas in which it was recommended that the Commission should conduct future work included a set of rules, or a code of conduct, covering the rights and obligations of information service providers, and a review of existing international conventions. The Working Party on Facilitation of International Trade Procedures of the Economic Commission for Europe (WP.4) was currently reviewing all international conventions applicable to international trade in order to identify those provisions that hindered the use of EDI. The Working Group had encouraged further collaboration between the Commission and WP.4 in that area.

28. Mr. HOLTZMANN (United States of America) said that if the Commission expected to have sufficient time to consider future work as well as major issues in the Guide, then it ought to consider only previously unresolved matters and not seek to reopen the discussion of any other issues on which it had already taken action. Secondly, with regard to the Guide, the secretariat was correct to seek guidance from the Commission on major issues. However, his delegation understood that the Commission would not have sufficient time to do so with great particularity and assumed that it would authorize the secretariat to finalize the Guide in accordance with the Commission's deliberations.

29. Mr. SORIEUL (International Trade Law Branch) said that the final version of articles 1 and 3 to 11 of the draft Model Law had been adopted by the Commission the previous year, at which time it had indicated that priority at its twenty-ninth session should be given to concluding work on the draft Model Law and Guide. In order to achieve that goal, the Commission should consider first and

foremost articles 2, 12 to 14 and article "x", raising as few questions as possible regarding previously discussed matters. However, in order to ensure that the final version of the Model Law and Guide were harmonious, some adjustments of the text, both in wording and in substance, might be necessary.

30. Mr. ABASCAL (Mexico) agreed with the representatives of the United States of America and the secretariat but warned that the rule to refrain from raising previously settled issues should not be interpreted too strictly. It was quite possible that decisions regarding article "x" would affect other provisions that had been adopted earlier, and it was vital that no discrepancies should arise that would be detrimental to the quality of the Model Law.

Article 12

31. Mr. PHUA (Singapore) said that current EDI technology allowed for two forms of acknowledgement of receipt: acknowledgement that was automatically generated without the intervention of the addressee and acknowledgement that required the intervention of the addressee. Article 12 as currently drafted was not entirely clear as to which form of acknowledgement of receipt was contemplated.

32. Mr. SORIEUL (International Trade Law Branch) said that the text of article 12 as currently drafted did not distinguish between the technical forms of acknowledgement of receipt.

33. Mr. CHOUKRI (Observer for Morocco) said that the reference in paragraph 4 to a "reasonable time" was too vague. Either it should be deleted or the Commission should specify the exact amount of time referred to, for example, "within a week" or "within a month's time".

34. Mr. ABASCAL (Mexico), referring to the question raised by the representative of Singapore, said that an automatically generated acknowledgement of receipt might not correspond to the acknowledgement requested by the originator.

35. Mr. MADRID (Spain) said it should be borne in mind that an acknowledgement of receipt was also a data message. The text of paragraph 2 not only raised that issue, as noted by the representative of Mexico, but also resolved it by providing that unless the acknowledgement conformed strictly to the originator's requirements, it could not be deemed valid.

36. Mr. BURMAN (United States of America) endorsed the Mexican representative's comments with regard to article 12, paragraph 2. It might be appropriate to amend the paragraph to read "Where the originator has not requested that the acknowledgement contain particular information, ...".

37. Mr. ABASCAL (Mexico) agreed with the representative of Spain that there might be undesirable consequences for the addressee if the acknowledgement of receipt was not in a particular form. An addressee whose equipment automatically generated an acknowledgement of receipt might believe that he had complied with the originator's request for acknowledgement and take action on that basis, whereas the acknowledgement might be deemed to be invalid. While the United States proposal was of interest, it did not address the issue raised

by the representative of Singapore, since the intention behind paragraph 2 was not to require that the acknowledgement should contain particular information, but that it should be in a particular form.

38. The concept implied by article 12, paragraph 2, was similar to that embodied in the United Nations Convention on Contracts for the International Sale of Goods, whereby specific conduct on the part of the party receiving a contract offer could be construed as constituting acceptance of the offer. The paragraph was also intended to give the addressee the widest possible choice of means of acknowledging receipt of a data message - for instance, by telephone, facsimile, and so on. The problem could best be solved by amending the paragraph to state that, even where the originator had requested that the acknowledgement should be in a particular form, if the addressee's equipment automatically generated a response, that should be deemed to constitute acknowledge of receipt.

39. Mr. ALLEN (United Kingdom) agreed with the representative of Spain that if the originator was not satisfied with an automatic form of acknowledgement, then the solution was to stipulate a particular kind of acknowledgement. He also concurred with the Mexican representative's view that the paragraph should not refer to a particular kind of information.

40. The CHAIRMAN said her understanding of article 12, paragraph 2, was that, where the originator had requested that the acknowledgement should be in a particular form, only an acknowledgement which was in the form requested could be deemed to be valid.

41. Mr. PHUA (Singapore) said that the United States and United Kingdom proposals did not address the concern which he had raised. If the addressee's equipment automatically generated an acknowledgement, then paragraph 2 would not be relevant. Paragraph 4 would, however, be relevant, because the originator would then have to rely on the amount of time that had elapsed in order to know whether or not the data message had been received. He proposed that the following sentence should be inserted at the end of paragraph 1: "This article does not apply where an acknowledgement of receipt is generated automatically, without intervention by the addressee."

42. Mr. MADRID (Spain) suggested that the concerns expressed by the representatives of Mexico, the United States of America and the United Kingdom could be met by amending article 12, paragraph 2, to read "Where the originator has not requested that the acknowledgement contain a particular kind of information or be sent by a particular means, ...". It should be borne in mind that article 12 applied only where no prior agreement existed between the parties. Accordingly, it was up to the originator to decide whether or not to request an acknowledgement of receipt. If an acknowledgement of receipt was requested, then the originator was entitled to stipulate that it should be in a particular form, in order to preserve the validity of the original data message. For that reason, his delegation could not accept the proposal just made by the representative of Singapore, which would preclude the application of paragraph 2.

43. Mr. CHANDLER (United States of America) endorsed the comments by the representative of Spain and suggested that, if the Commission had reached a consensus on amending paragraph 2 along the lines proposed, the matter could be referred to the drafting group. His delegation also concurred with the Spanish delegation's view that amending paragraph 1 as suggested by the representative of Singapore could constitute a major step backward in the light of current developments in electronic commerce. There was a growing number of ad hoc contractual practices in which pre-set arrangements triggered inventory dispatch and other contractual actions. In view of those developments, his delegation had recently introduced a draft text which referred to the concept of an electronic agent and was, in part, intended to cover arrangements of that type.

44. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that, as a practical matter, his organization could not support the Singaporean proposal, since the recipient could, if he so wished, deactivate the acknowledgement feature on his computer.

45. Mr. BISCHOFF (Observer for Switzerland) recalled that the intention underlying article 12 had been to confirm the automatic receipt of a data message. Such confirmation was always linked to a particular form; he therefore believed that the applicability of the draft article should be limited to a particular form of acknowledgement.

46. Mr. SCHNEIDER (Germany) said that the representative of Singapore had raised a substantive issue, not merely a drafting problem. Draft article 12 had to be read in conjunction with draft article 14, which dealt with the circumstances under which a data message was deemed to have been received. A situation might arise in which an automatic acknowledgement was generated even though a data message had not been received, a problem which paragraph 2 of article 12 did not address.

47. Mr. ALLEN (United Kingdom) said that the situation referred to by the previous speaker was part of a wider issue, involving cases where an acknowledgement of receipt was given, but not by the addressee. That issue could be addressed in paragraph 5 of article 12, by stipulating that that paragraph applied where the originator received an addressee's acknowledgement of receipt. The question then arose as to whether the acknowledgement had actually been given by the addressee; however, in his delegation's view, that question was dealt with adequately in article 11.

48. Mr. PHUA (Singapore) thanked the representative of Germany for having summarized his delegation's concerns so succinctly. While his delegation did not wish to inhibit the use of automatic acknowledgement of receipt, it believed that the wording of article 12 was too broad and did not specify whether the provision referred to acknowledgement of receipt by the addressee or by the system. Nevertheless, his delegation could accept the solution proposed by the representative of the United Kingdom.

The meeting rose at 6 p.m.

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SUMMARY RECORD OF THE 587th MEETING

Held at Headquarters, New York,
on Thursday, 30 May 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80688 (E)

The meeting was called to order at 10.10 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17, A/CN.9/426)

Article 12 (continued)

1. Mr. SANDOVAL LÓPEZ (Chile) proposed some drafting changes in article 12 which he believed would solve the problems referred to by the German representative at the previous meeting. Paragraph 2 of the article should read: "Where the originator has not requested that the acknowledgement be in a particular form, it shall be understood that any communication from the addressee, including in electronic form, should be sufficient to indicate to the originator that the data message has been received ...." Paragraph 5 could begin: "Where the originator receives an acknowledgement of receipt of a data message, whether by communication or conduct of the addressee, including in electronic form, it is presumed that the addressee has received that message ...."

2. Mr. SORIEUL (International Trade Law Branch) replied to a number of questions raised at the previous meeting. Concerning a situation where a message was acknowledged but had not been received, he drew the Commission's attention to article 12, paragraph 5, and to the Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426). In fact, there was a clear analogy with the regular mail where a letter was sent by "return receipt requested" and was acknowledged, but not received by the addressee.

3. The specific form of an acknowledgement of receipt, dealt with in paragraph 2, was also a matter of interpreting legal norms by analogy with the regular mail. If the acknowledgement was not in the particular form specified by the originator, it would be considered not to have been received and the procedure laid down in article 12, paragraph 4, would apply. Paragraph 2 could also be expanded to cover cases in which the originator requested a particular form of acknowledgement. Neither of those questions was directly related to that of acknowledgements in electronic form; from the outset, the Commission had understood that the form of an acknowledgement was left to the originator's discretion. That was clearly explained in the Guide to Enactment of the UNCITRAL Model Law.

4. The representative of Singapore had asked about distinguishing between an acknowledgement of receipt in electronic form, which might be automatically generated by the addressee's equipment, and other forms which would require the addressee to take action. In fact, the Working Group had not misunderstood the differences between the various categories of electronic acknowledgements, ranging from devices which responded automatically to those which required human intervention. In order to avoid complications, article 12 deliberately did not go into detail but rather focused on the function of an acknowledgement, while providing some general principles. Before taking action, the Commission should seriously weigh the benefits of breaking up article 12 into a number of more specific provisions.

5. Mr. CHANDLER (United States of America) said article 12 did not have to contain details on various forms of acknowledgement because the parties would of necessity have reached a prior understanding if they used sophisticated acknowledgements such as retransmitting the message back to the originator for verification. If such an understanding existed between the parties, there was no need for intervention.

6. The word "form" was potentially misleading because it had several uses. It could be understood to mean a bureaucratic form or a generalized form in structured electronic data interchange. It would be regrettable if the use of the term resulted in the rejection of an acknowledgement. Perhaps another term, such as "kind" or "method", should be used.

7. Mr. ALLEN (United Kingdom) said the beginning of article 12, paragraph 2, should read: "Where the originator has not requested that the acknowledgement be given by a particular method ...".

8. Mr. BISCHOFF (Observer for Switzerland) said he would prefer to retain the word "form" and add "method" and/or "particular type". He proposed inserting the words "be of a particular type or" before "be in a particular form".

9. Mr. ABASCAL (Mexico) noted that the word "form" appeared in many articles of the Model Law. If it were deleted in one place, the Working Group would be forced to review its use in other articles for the sake of consistency.

10. Mr. ALLEN (United Kingdom) agreed with the observer for Switzerland that "form" should be retained. The English version would then read: "Where the originator has not requested that the acknowledgement be in a particular form or be given by a particular method ...".

11. Mr. MADRID (Spain) agreed with the Mexican representative that "form" should not be deleted. Unless delegations felt strongly that the specific forms of acknowledgement should be differentiated, it would be preferable not to engage in an exercise that involved reviewing the language of all the articles.

12. Mr. SCHNEIDER (Germany) supported the remarks made by the Observer for Switzerland and the representative of Spain. The term "form" should be retained, although he was not averse to adding "procedure" or "method".

13. Mr. CHOUKRI (Observer for Morocco), citing various articles of the Model Law, stressed that the term "form" was the most suitable.

14. Mr. ABASCAL (Mexico) said that the problem stemmed from the fact that the concept of "acknowledgement of receipt" was not defined. "Acknowledgement of receipt" should mean that the message was received and nothing more. The lacuna in article 12 could be rectified by adding a paragraph indicating that an acknowledgement of receipt in electronic form fulfilled all the requirements of paragraphs 2, 3 and 4.

15. Mr. SANDOVAL LÓPEZ (Chile) agreed with the Mexican representative that there was a lacuna in article 12, paragraph 2, because an acknowledgement in electronic form was not specifically mentioned.

16. Mr. SORIEUL (International Trade Law Branch) stressed that "acknowledgement" simply meant that the message had been received. As specified in the Guide to Enactment of the Model Law, it gave no indication of the addressee's position on the content of the message. He failed to see how article 12, paragraph 2, was insufficient or in any way opposed to an acknowledgement in electronic form. The paragraph was intended to describe the function, not limit the form, of an acknowledgement; it even recognized the addressee's conduct as a tacit form of acknowledgement (the classic example being when an originator placed an order for goods and the addressee shipped the goods without acknowledging receipt of the order). If the Commission wished, it might specify in the Guide that acknowledgement could be manual or electronic; however, even that seemed redundant.

17. Ms. BOSS (United States of America) said that the original intent of article 12 was to validate acknowledgements of receipt generated by computers. While her delegation would prefer to retain article 12 as it stood, the fact that some delegations had raised questions about the interpretation of the article indicated that the intent of the article had not been expressed clearly. The amendment suggested by the representative of Mexico might help to clarify that functional acknowledgements could be issued spontaneously by computers and still satisfy the requirements of article 12. Unfortunately, that proposal might exclude other types of acknowledgement, such as instances where an acknowledgement of receipt was issued on behalf of an addressee by its third-party provider or by an intermediary.

18. Mr. ZHANG Yuqing (China) said that his delegation supported the Mexican proposal. According to article 12, paragraph 2, if the originator requested that the addressee should use a particular form of acknowledgement, only that form could be regarded as the acknowledgement of receipt. In cases where there was no particular request, any communication or conduct could constitute acknowledgement of receipt. The particular form requested by the originator should be taken as the standard; otherwise, any kind of communication or conduct could be regarded as acknowledgement of receipt. Perhaps a few more sentences could be added to paragraph 2 in order to clarify the concept of "particular form".

19. Mr. ABASCAL (Mexico) said that the secretariat's suggestion that the problem of defining "acknowledgement of receipt" could be solved by referring to another document was not appropriate. The definition must be provided in the Model Law itself.

20. The problem in article 12, paragraph 2, was that, if the originator sent a message requesting a particular form of acknowledgement, and the addressee had a system that issued acknowledgements of receipt automatically, it was quite probable that the addressee would assume that there had been automatic acknowledgement of receipt and would not pay any attention to the written message. That might lead to a situation in which it would be deemed that there had been inappropriate conduct on the part of the addressee because he did not comply with the originator's request.

21. The United States representative had made the point that, if the Commission dealt with automatic acknowledgements of receipt, it might be excluding other

types of acknowledgement. Perhaps the Commission could come up with much more general wording that would cover the overall situation. In order to avoid referring to automatic acknowledgement of receipt in a given system, the Commission might consider such wording as "the addressee uses a method for acknowledgement of receipt in which he can place reasonable trust without observing any particular conduct". That would provide security for all parties in the transaction and would promote the use of electronic data interchange.

22. Mr. ALLEN (United Kingdom) said that, in order for the presumption contained in article 12, paragraph 5, to apply, it should be sufficient if the acknowledgement of receipt was an acknowledgement of the addressee, whether such acknowledgement was generated automatically or generated by the addressee personally or by a person acting on the addressee's behalf. The acknowledgement would not be sufficient if it was generated by a third person who was not acting on behalf of the addressee. The beginning of the first sentence of article 12, paragraph 5, should be amended to read "Where the originator receives an acknowledgement of receipt of the addressee,".

23. Article 11, paragraph 2, did not contemplate the possibility of an automatic message, and he suggested that the following words should be added to the end of that paragraph: "or by a system operated by or on behalf of the originator". That would make it clear that any automatically triggered message that was communicated by a system by or on behalf of the originator would be attributed to that originator. In article 12, paragraph 5, an automatically triggered acknowledgement of receipt would then fall within that wording because paragraph 5 would have been amended to make it clear that it only concerned an acknowledgement of receipt of the addressee.

24. Mr. SORIEUL (International Trade Law Branch) said that, while the United Kingdom proposal might improve the text of article 12, it would not solve the problem under consideration. In its current form, article 12, paragraph 2, must be interpreted a contrario; in other words, if the originator of the message requested that acknowledgement of receipt should be provided in a particular form and that form was not respected, it would follow that the conditions required in article 12, paragraph 4, had not been fulfilled and acknowledgement of receipt had not been received. The Commission was now being told that, if the addressee had a system that issued acknowledgements of receipt automatically, the automatic acknowledgement of receipt must be accepted as valid in the Model Law even if the form of the acknowledgement of receipt was not the one requested by the originator. Perhaps article 12, paragraph 2, could be amended to indicate that any automatically issued acknowledgement of receipt was automatically valid even if the originator had not requested that particular form of acknowledgement.

25. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that it was his understanding that article 12, paragraph 2, did not deal with any questions that were unrelated to the originator's request. His delegation was satisfied with the text as it stood. Perhaps additional paragraphs could be added to article 12 in order to deal with the questions raised by a number of delegations.

26. Mr. ABASCAL (Mexico) said that the explanations and suggestions by the secretariat were very reasonable. According to the current drafting of article 12, paragraph 2, the originator determined the procedure for acknowledgement of receipt. His delegation was proposing that the originator should not determine the form or method for acknowledgement of receipt. Rather than referring to automatic acknowledgement of receipt, the Commission should use language that made it clear that the addressee should be able to use a reasonably trustworthy method of acknowledgement of receipt. That would protect the use of electronic data interchange systems.

27. While the United Kingdom proposal contained some useful elements, article 11, paragraph 2, was not applicable to the question under discussion.

28. Mr. CHOUKRI (Observer for Morocco) said that his delegation preferred to retain the text of article 12, paragraph 2, as it stood.

The meeting was suspended at 11.25 a.m. and resumed at 12.05 p.m.

29. Mr. SORIEUL (International Trade Law Branch) said the Commission needed to decide how it wished to deal with acknowledgements of receipt that were automatically generated. On the one hand, allowing the originator to determine the form of acknowledgements of receipt was not desirable, but on the other, the possibility that the originator would need to receive acknowledgement in a particular form could not be ignored either. As currently provided for under article 12, control of the procedure for acknowledgement of receipt lay largely with the originator.

30. Mr. MADRID (Spain), supported by Mr. SANDOVAL LÓPEZ (Chile), raised the possibility of a more balanced solution that would not give the determining power to either the originator or the addressee. Article 12, paragraph 2, could be amended to read "Where the originator has requested that the acknowledgement be in a particular form, the request for an acknowledgement shall be deemed satisfied if the requirements established by the originator have been met. However, if the addressee has an automatic system for acknowledgement of receipt, the request for an acknowledgement may be deemed satisfied when the acknowledgement is sent to the originator."

31. Mr. ALLEN (United Kingdom) agreed with the Spanish representative that a more balanced approach was needed, and proposed that the following sentence should be added to the beginning of paragraph 2: "Where the originator has requested that acknowledgement be given in a particular form, or by a particular method, an acknowledgement is only sufficient for the purposes of paragraphs 3 and 4 if given in that form or by that method, provided that the form or method requested is not unreasonable in the circumstances."

32. Mr. CHANDLER (United States of America) said that while article 12 had originally been intended as a default rule, its current formulation left to the originator the exclusive ability to determine the particular form to be taken by the acknowledgement of a message; perhaps the addition of a formulation such as "When the parties have not otherwise agreed on a particular form" would be more useful. The phrasing suggested by the United Kingdom still appeared to leave undue control in the hands of the originator.

33. Mr. FERRARI (Italy) agreed with the United States representative in calling for a reference to whatever agreement existed between originator and addressee regarding the form or manner of acknowledgement, rather than allowing the originator exclusively to determine the form of that acknowledgement. He also requested the deletion from the United Kingdom proposal of the wording concerning unreasonable requests.

34. Mr. ABASCAL (Mexico) said that the United Kingdom proposal was reasonable; he also supported the United States proposal to make explicit the fact that article 12 was a default rule. The two proposals could be combined by stating clearly that when the parties had not agreed on a method for acknowledging receipt, and when the originator had requested a particular method, then the request for acknowledgement should be satisfied in accordance with the originator's request if that request were reasonable under the circumstances.

35. Mr. SCHNEIDER (Germany) said that the meaning of the new text as proposed by the United Kingdom was very different from that of the old text. While it was necessary to fulfil an explicit request by the originator for acknowledgement in a particular form, a separate and distinct question arose as to the feasibility of making an acknowledgement in the form of a data message when no particular form had been requested.

36. A question also arose as to the nature of the presumption in article 12, paragraph 5: i.e., whether an acknowledged message had simply been received, or if it had been received exactly as sent. He therefore proposed that some form of wording such as "Presumption does not extend to the content of the message" should be added at the end of the paragraph.

37. Mr. PHUA (Singapore) said he supported the United Kingdom proposal and agreed with the German delegation that the presumption established in paragraph 5 was unclear. To solve that problem, he proposed that paragraph 5 should contain a statement similar to the eighth sentence of paragraph 98 of the Guide, to the effect that article 12 was not intended to deal with the legal consequences that might flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message.

38. Mr. GRIFFITH (Australia) said that the United Kingdom proposal would substantially alter paragraph 2 so that it no longer dealt with cases where the originator of a data message did not request a particular form of acknowledgement, but with the opposite situation. It would also create uncertainty for the addressee, who would have to determine what was or was not "unreasonable in the circumstances"; under paragraphs 3 and 4, any errors in that regard would nullify the legal effect of the acknowledgement. The Commission should not make such substantial changes to the text, since they only introduced new uncertainties.

39. Mr. SORIEUL (International Trade Law Branch) said that it was his understanding that the United Kingdom proposal was intended only as an addition to the current text, not as a replacement.

40. Mr. GRIFFITH (Australia) said he agreed with the representative of Germany that the Commission should assume that the current text was being retained unless delegations expressed clear and unanimous views to the contrary.

41. Mr. BURMAN (United States of America) said he shared the view expressed by the representative of Australia. He would prefer to retain the current text of paragraph 2, but with the wording proposed by his delegation. If delegations wished to consider additional provisions, such as the addition proposed by the United Kingdom, it could establish a small working group to study them and report back to the Commission; he suggested that the delegation of Singapore should organize that group.

42. Mr. ANDERSEN (Observer for Denmark) said he agreed with the United States delegation that a drafting group should be set up.

43. Mr. PHUA (Singapore) said his delegation accepted the United States proposal that it should head the working group.

44. Mr. ABASCAL (Mexico) said he wished to clarify that the proposal concerned a working group and not a drafting group, and that its role would be to find a compromise solution to the issues raised.

45. Mr. SORIEUL (International Trade Law Branch) said the working group would require a precise and narrowly defined mandate. He wondered whether that mandate would include the consideration of the United Kingdom proposal, the issue of automatic acknowledgements and the United States proposal to delete the references in paragraph 2 to the originator of a data message as the party that determined the form of the acknowledgement of receipt. That last proposal would affect the whole of article 12, which concerned situations where the originator took the initiative in that regard. The working group could also consider the presumption established in paragraph 5; in that connection, he agreed with the representative of Singapore that the sentence from paragraph 98 of the Guide would provide a useful clarification.

46. Mr. ABASCAL (Mexico) said a working group could be useful for expediting the Commission's work and for finding compromise solutions that would enable the Commission to take a better-informed decision. The working group should take into account the points raised by the representatives of Spain and the United Kingdom, to the effect that neither the originator nor the addressee should be given all the power to determine the form of an acknowledgement, and should draft the resulting provision in positive terms, in contrast to the current text of paragraph 2, which was easily misinterpreted. The Commission should identify other problems with article 12 for submission to the working group.

47. Mr. LEBEDEV (Russian Federation) said he agreed that the current text of article 12 should be considered a "default" text that should be retained to the extent possible. The working group should prepare a written text comprising proposed alternatives to the current text; it should not simply present its conclusions orally. To save time, the text could be circulated in only one language.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 588th MEETING

Held at Headquarters, New York,
on Thursday, 30 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

96-80694 (E)

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The meeting was called to order at 3.15 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 12 (continued)

1. Mr. PHUA (Singapore) said that a new version of article 12 of the draft Model Law had been produced immediately before the meeting by an informal working group in response to the comments made at the previous meeting. If the proposed changes were adopted, paragraph 1 of that article would then read: "Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged." Paragraph 2 would read: "Where the originator has not requested or agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, the request for an acknowledgement may be satisfied by (a) any communication by the addressee, automated or otherwise, or (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received."

2. Paragraphs 3 and 4 would remain unchanged. Paragraph 5 would read: "Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. This presumption does not imply that the data message sent corresponds to the message received."

3. Paragraph 6 would read: "Where the received acknowledgement states that the related data message met technical requirements either agreed upon or set forth in applicable standards, such as those verifying the integrity of its contents, it is presumed that those requirements have been met."

4. Paragraph 7 would read: "Apart from establishing receipt of the data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt."

5. Mr. GRIFFITH (Australia) said that the second sentence of paragraph 5 was unnecessary, and somewhat inconsistent with the terms of article 11, paragraph 4.

6. Mr. SORIEUL (International Trade Law Branch) noted that the new paragraph 2 attempted to deal both with situations in which the originator of the message had requested acknowledgement of receipt and with situations where the parties had agreed that such acknowledgements should be provided as a matter of course. He wondered whether it was logical or feasible to provide for both types of situation in a single formula; the new wording did not seem to take into account the considerable difference between a situation where the addressee failed to acknowledge receipt in the manner requested by the originator, and one where the parties had agreed in advance that such acknowledgement should be provided in a particular manner.

7. Mr. FERRARI (Italy) said that in cases where the acknowledgement of receipt was not given in the form requested by the originator, it would be considered that no acknowledgement of receipt had been given.

8. Ms. BOSS (United States of America), responding to the remarks by the representative of the secretariat, said that the result should be the same whether acknowledgement was requested in a particular form or whether there was an agreement that it should be in a particular form. Taken in context, the new wording did make sense.

9. Mr. ZHANG Yuqing (China) said that his delegation had some difficulties with the attempt to cover the two different situations in a single paragraph. The practical application of the law would be facilitated if the text could be made more clear, preferably with concrete examples.

10. Mr. ABASCAL (Mexico) said that where an agreement between the parties existed it would apply, and the attempt to cover that situation in article 12 was an unnecessary source of confusion. Also, the new draft still gave the originator the right to determine unilaterally the form in which acknowledgement of receipt was to be given. If that solution was adopted, he hoped that the reasons for it would be expressed clearly so that in the future, those who had to apply the law would be able to understand them.

11. Mr. CHOUKRI (Observer for Morocco) agreed with the representative of the secretariat that the draft should not have attempted to provide for the two different situations in a single paragraph. Article 12 should provide only for the situation where acknowledgement was requested in a particular form.

12. Mr. ANDERSEN (Observer for Denmark) said that where no prior agreement existed, it was logical that the originator of the message, who would usually be the party making an offer, should be empowered to determine whatever conditions he wished. Where a prior agreement existed, the form of the acknowledgement would in any case be determined by that agreement.

13. In order to avoid spending too much time on further discussions of the wording of article 12, it would be useful to determine which version of the text was preferred by the majority of the members of the Commission and to proceed on that basis.

14. Mr. FERRARI (Italy) said it should not necessarily be assumed that the originator of the message would be the offeror. If the party accepting an agreement was the originator of the message and requested the addressee to acknowledge receipt in a particular manner, that would amount to an attempt to modify the acceptance, which was not possible.

15. Ms. BOSS (United States of America) said that paragraph 7 was intended to solve that problem, by making it clear that article 12 did not deal with legal consequences such as offer and acceptance.

16. Mr. FERRARI (Italy) said that under the contract law of many countries, the acceptance could not contain a request for modification of the terms of the agreement, however minor.

17. Mr. MADRID (Spain) said that it was an unnecessary repetition, and a potential source of confusion, for article 12 to refer to the agreement between the parties; the latter was dealt with comprehensively in article 10, which was applicable to chapter III as a whole.

18. As to the substantive question at issue, a clear distinction must be made between the content of the message, which was a matter of contract law, and the requirements for acknowledgement of its receipt, which was only a technical matter, and in respect of which the Commission should try to find some middle ground in order to avoid giving all power to the originator.

19. Mr. PHUA (Singapore) said that the representative of Spain had clearly identified the problem faced by the Commission, namely that there was a distinction between acknowledgement of receipt and the legal concept of acceptance. That was the reason for the inclusion of paragraph 7 in the new draft. The determination of the legal consequences that might flow from the acknowledgement of receipt would have to be left either to whatever agreement had been reached between the parties as to the consequences of certain forms of acknowledgement or to the domestic laws of the country concerned, in which case paragraph 7 left the courts free to arrive at whatever conclusion they wished on the basis of the facts.

20. Mr. ABASCAL (Mexico) said that the reasons put forward for giving the originator the power to request an acknowledgement of receipt were still insufficient. In formulating trade law, it was necessary to observe what happened in practice and regulate that activity, and the law should be based on what was reasonable and customary, rather than on unusual cases. Paragraph 7 left matters in a vacuum, and did not meet the concerns expressed by the observer for Denmark and the representative of Italy.

21. Ms. BOSS (United States of America) said that there was no difference between the two versions of article 12 as far as the question of the empowerment of the originator to make unilateral requests was concerned. Only the new version attempted to make a distinction between the mere receipt of a message and the legal consequences that might flow from that message or the acknowledgement of its receipt. The role of agreements between the parties was not addressed in the old version but was taken up in the new version, which made it clear that the default rule in paragraph 2 did not apply where there had been an agreement to the contrary, and that in that regard the agreement was the same as a request. She urged the Commission to decide which version of article 12 it wished to work on so that it could take up the issue raised by the representative of Mexico.

22. Mr. ALLEN (United Kingdom) said that the new paragraph 2 dealt not with a case where there had been an agreement, but with a case where there had been no agreement; there was no reason in principle to treat such a case differently from a case in which the originator had not requested a particular form of acknowledgement. It was true that the implication of paragraph 2 was that where the originator had requested a particular form or a particular method of acknowledgement and that request was not complied with, the requirements of article 12 were not met. However, that was also true of the old paragraph 2, so that no change had been made.

23. His delegation would be content to consider the additional paragraph it had proposed at the previous meeting in order to address the concerns raised by the representative of Mexico and others.

24. Mr. GRIFFITH (Australia) said it seemed that the balance of opinion viewed the new draft as an improvement. The Commission should therefore take a decision on it.

25. His delegation did not feel that the inclusion of the second sentence of paragraph 5 was justified, since it was a derogation from the first sentence of that paragraph. There was no point in making a presumption, and immediately derogating from it.

26. Mr. FERRARI (Italy) said it was obvious that acknowledgement of receipt did not amount to acceptance. The problem was that if the originator unilaterally asked for an acknowledgement of receipt, there could be inconsistencies with contract law in many countries, since such a request could change or modify the acceptance.

27. Mr. SORIEUL (International Trade Law Branch) said that, on the question of the extent to which requesting acknowledgement of receipt might constitute a violation of contract law or a modification of an offer, the situation was much the same in paper-based communications. The problem lay in determining whether the form of the acknowledgement of receipt established by the originator of the message was binding in all cases on the recipient or whether an acknowledgement of receipt in another form was valid, whether there should be a general rule of invalidity and, if so, what the exceptions to such a rule should be.

28. Mr. FERRARI (Italy) said that he had referred only to the originator as acceptor because when the originator was the offeror, he was the master of the offer and could determine the form of the acknowledgement of receipt. There was a difference between asking the offeror to act by acknowledging receipt and sending registered mail with acknowledgement of receipt. In many cases, contract law had a mirror-image requirement; that meant that not even the slightest change could be made, and asking for an acknowledgement of receipt would constitute a change.

29. Mr. SCHNEIDER (Germany) said that both the problem and its solutions were clear; the Commission must make a decision. His delegation was in favour of the new version of article 12. It was true that the second sentence of paragraph 5 deviated from article 11, paragraph 5, but the problem lay in the fact that the Commission had not completed its consideration of article 11 and was therefore dealing with a specific problem before solving a general problem. The second sentence of paragraph 5 provided clarification, and his delegation was in favour of retaining it.

30. The CHAIRMAN suggested that, as there seemed to be a tendency to prefer the new version of article 12, the Commission should therefore work on that version.

31. Ms. BOSS (United States of America) said there seemed to be disagreement on whether the originator should have the power to ask that acknowledgement be made in a particular form. Article 12 did not address the issue; it merely provided

that in the absence of a request, certain rules applied. It could be argued that if there was such a request, the traditional contract rules came into play. The current wording of article 12 might therefore be the best solution in that it did not attempt to reconcile irreconcilable differences.

32. Mr. AL HERZ (Observer for Kuwait) asked whether there was a standing drafting committee of the Commission. If not, his delegation proposed that such a committee should be set up.

33. Mr. SORIEUL (International Trade Law Branch) said that the function of drafting committees was to align the different language versions of a text; such committees usually met when a draft was near completion. The Commission was still discussing the substance of article 12, and an informal working group could go much further than a drafting committee would be authorized to go. There was no standing committee for the drafting of texts.

34. Mr. ABASCAL (Mexico) said that since there was no agreement on the course to follow, the Commission should take up the text put forward by the representative of the United Kingdom, which was a compromise between the two positions. If it was not possible to reach a compromise on the basis of that text, the only solution would be to eliminate paragraph 2 altogether.

35. Mr. ZHANG Yuqing (China) said that the Commission had spent too much time on article 12, paragraph 2, and at that rate would not be able to complete its work. His delegation hoped that the draft put forward by the representative of the United Kingdom could be accepted. The Commission must solve the problem of paragraph 2 first and then take up the other paragraphs.

The meeting was suspended at 4.35 p.m. and resumed at 5.10 p.m.

36. The CHAIRMAN said that there appeared to be a clear preference for the new draft of article 12 and suggested the deletion of the words "requested or" in the first line of paragraph 2.

37. Mr. KOIDE (Japan), referring to article 12, paragraph 3, said that the phrase "the data message has no legal effect" was inappropriate, as it might lead to the misconception that receipt of acknowledgement in itself had some legal effect. That phrase should therefore be replaced by the similar wording used in paragraph 4 (b): "treat the data message as though it had never been transmitted".

38. Mr. FERRARI (Italy) said that his delegation supported the amendments suggested by the Chairman, as they were consistent with the contract law of all countries.

39. Mr. ABASCAL (Mexico) also agreed with the Chairman's suggestion.

40. Mr. BORMAN (United States of America) said that the Chairman's proposed change was an effective resolution and that the amendment suggested by the representative of Japan was useful in bringing the two provisions into conformity.

41. Mr. PHUA (Singapore) supported the proposed amendment to new article 12, paragraph 2.

42. Mr. CHOUKRI (Observer for Morocco) said that article 12 was not a fundamental article since it related solely to acknowledgement of receipt. Since the other cases were covered by other paragraphs, he saw no need to delete the words "requested or" in new paragraph 2. Furthermore, acknowledgement of receipt had nothing to do with offers and their acceptance, which was already covered by article 13. If there was an acknowledgement of receipt, such acknowledgement had no impact on the place or date of the contract already specified in article 14. Indeed, it was the originator who had the right to ask for acknowledgement of receipt and to specify the form it should take.

43. Mr. TELARANTA (Finland) said he agreed with the statements made by the representatives of Denmark and Germany.

44. The CHAIRMAN suggested that the amendments proposed by the representative of Japan concerning paragraph 3 should be adopted. She then asked why the phrase "such as those verifying the integrity of its contents" had been placed in square brackets in paragraph 6.

45. Mr. PHUA (Singapore) explained that the working group had included the bracketed phrase to clarify the term "applicable standards".

46. Mr. ABASCAL (Mexico) endorsed the suggestion made by the representative of Japan with respect to article 12, paragraph 3, and drew attention to the end of that paragraph, which read "until the acknowledgement is received". As far as he was aware, no decision had been taken as to whether it was the rule governing the acknowledgement of receipt or the rule governing the dispatch of acknowledgement of receipt that was the correct one. The end of paragraph 3 could very well read "until the acknowledgement is dispatched". If the originator was unilaterally setting conditions, it was logical to assume that the addressee would be released if he dispatched the acknowledgement. In his delegation's opinion, the rule governing dispatch was more logical than the rule governing receipt.

47. Mr. ALLEN (United Kingdom) said that his delegation could not agree to the proposal made by the representative of Japan. The situation reflected in paragraph 4 (b), where the key words were "upon notice to the addressee", was very different from that in paragraph 3, which made the originator's message conditional on receipt of an acknowledgement. In the latter case, the absence of an acknowledgement should automatically render the data message null and void. It should not be necessary for the originator to give notice to the effect that the data message was to be treated as though it had never been transmitted because he had already made his message conditional on receipt of an acknowledgement. It would make a nonsense of the provision to insert in paragraph 3 the words which appeared in paragraph 4 (b).

48. Some delegations would not accept the Chairman's amendment if the Commission did not add a further provision which would enable the originator to request an acknowledgement in a particular form and to insist that that form should be complied with. He therefore proposed the insertion of an additional

paragraph after paragraph 3 which would read "Where the originator has stated that the data message is conditional on receipt of an acknowledgement given in a particular form or by a particular method, the data message has no legal effect until an acknowledgement given in that form or by that method is received".

49. Mr. FERRARI (Italy) said that if article 12, paragraph 2, was amended as suggested by the Chairman to read "where the originator has not agreed with the addressee", article 12, paragraph 3, should be changed since its current wording appeared to give the originator the power to request an acknowledgement of receipt. It could be amended to read "Where it is stated that the data message is conditional on receipt of that acknowledgement, ...". The intention behind the Japanese proposal could be accommodated with the wording "the data message the reception of which has not been acknowledged is treated as though it had never been transmitted".

50. He agreed with the representative of Mexico that it had not yet been decided whether the acknowledgement was effected upon receipt or upon dispatch. There were other uniform law conventions drafted by UNCITRAL which were based on dispatch.

51. The United Kingdom proposal could be considered, since the spirit underlying it was similar to that underlying his delegation's proposal concerning article 12, paragraph 3.

52. Ms. BOSS (United States of America) said that her delegation endorsed the deletion of the words "requested or" in paragraph 2 and the idea of reconciling the provisions of paragraph 3 with those of paragraph 4. While the exact way in which those recommendations should be implemented had not yet been specified, it was apparent that consensus had been reached on those two points.

53. With regard to the Mexican representative's concerns relating to paragraph 3, most existing trading partner agreements used a receipt rule rather than a dispatch rule for determining legal effectiveness, and an attempt had been made to adopt that solution in the Model Law. The Mexican proposal would create inconsistencies within paragraph 3, which referred specifically to conditionality based on receipt and not on dispatch or acknowledgement. Her delegation favoured retaining the word "receipt" in paragraph 3 and did not support the proposal of the United Kingdom, which it believed to be inconsistent with the existing text of paragraphs 2 and 3.

54. Mr. LEBEDEV (Russian Federation) questioned the need to retain in the first paragraph a reference to the agreement between the originator of the message and the addressee.

55. Mr. ABASCAL (Mexico) thanked the representative of the United States of America for her explanation regarding paragraph 3 and said that he could now endorse paragraph 3 as drafted. The additional paragraph proposed by the United Kingdom would reopen the discussion which the deletion of the words "requested or" from paragraph 2 had sought to eliminate, namely, that the Model Law should not deal with the cases where an originator had required that acknowledgement should be given in a particular form. The assumption in paragraph 1 did not

refer to acknowledgement in any particular form and there was therefore no need to modify paragraph 2.

56. Mr. ALLEN (United Kingdom) explained that his delegation's proposal was not meant to supersede existing paragraph 3, but to follow it, either at the end of it or as an additional paragraph. If the originator was entitled to make his message conditional on receipt of an acknowledgement, then it should also be possible for the originator to make the message conditional on receipt of an acknowledgement in a particular form.

57. Mr. FERRARI (Italy) said that article 12, paragraph 3, whether amended as proposed by the representative of Japan or retained as drafted, was inconsistent with paragraph 7 of the same article, since paragraph 7 excluded the legal consequences of the acknowledgement of receipt.

58. Mr. MADRID (Spain) wondered whether, if the Commission decided to adopt the Chairman's proposal and delete the words "requested or" at the beginning of paragraph 2, it would be also be necessary to delete the reference to "request" at the end of paragraph 2. He favoured a receipt rule rather than a dispatch rule.

59. Mr. BURMAN (United States of America) supported the modification proposed by the representative of Spain and said he was encouraged to see that delegations had found a basis for compromise with regard to the final drafting of article 12.

60. The CHAIRMAN confirmed that the Commission had reached agreement with regard to article 12, paragraphs 1 and 2, and proposed that a small drafting group should address the apparent discrepancy between paragraph 3 and paragraph 7.

The meeting rose at 6 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 589th MEETING

Held at Headquarters, New York,
on Friday, 31 May 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80700 (E)

The meeting was called to order at 10.15 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A'50/17; A/CN.9/406, 407, 409 and Add.1-4, 421 and 426)

Article 12 (continued)

1. The CHAIRMAN said the only remaining problem with the informal working group's new text for article 12 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, which had been read out at the beginning of the previous meeting, was the conflict between paragraphs 3 and 7.

2. Mr. FERRARI (Italy) proposed that the words "and subject to paragraph 3" should be inserted in the first sentence of paragraph 7 after the phrase "Apart from establishing receipt of the data message", so as to reconcile the content of paragraph 7 with the reference to "legal effect" in paragraph 3.

3. Mr. TELL (France) said his delegation still wanted to delete the words "has requested or" from paragraph 1 and the words "requested or" from paragraph 2, as it had proposed at the previous meeting. He wondered whether paragraph 3 was necessary, since, if a data message was "conditional", it obviously had no legal effect until the relevant condition was met; the same could be said of paragraph 4. The proposed amendments seemed to call the whole structure and purpose of article 12 into question; in his view, the article was merely intended to set minimum standards for electronic data interchange. However, he did not object to the new version of the article, which provided for a more balanced relation between the parties and did not prejudge the legal consequences deriving from the receipt of a data message.

4. Ms. BOSS (United States of America) and Mr. KOIDE (Japan) said they supported the Italian proposal.

5. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said the Italian amendment should also refer to paragraph 4, because treating the data message as though it had never been transmitted was one of the legal consequences referred to in paragraph 7.

6. Ms. BOSS (United States of America) said paragraph 4 was not referred to in paragraph 7 because it concerned the establishment of the time of receipt, which was covered by the beginning of paragraph 7 as currently drafted. The key difference between paragraphs 3 and 4 was that the former went beyond the question of receipt to deal with the question of the effectiveness of the underlying message. Therefore, the amendment to paragraph 7 should refer only to paragraph 3.

7. Mr. FERRARI (Italy) said he supported the position of the United States.

8. Mr. ALLEN (United Kingdom), Mr. ANDERSEN (Observer for Denmark), Ms. REMSU (Observer for Canada) and Mr. SCHNEIDER (Germany) said they agreed

with the observer for the International Association of Ports and Harbors that the reference to paragraph 4 should be included.

9. The CHAIRMAN asked whether the Commission wished to delete the words in square brackets in the new version of paragraph 6.

10. Mr. PHUA (Singapore) said that if the term "applicable standards" in paragraph 6 did not require the clarification provided by the words in square brackets he had no objection to deleting those words.

11. Mr. MADRID (Spain) proposed that, since the words in square brackets were of an explanatory nature, they should be moved to the Guide to Enactment of the UNCITRAL Model Law (A/CN.9/426).

12. Mr. ABASCAL (Mexico) said that, in the final version of paragraph 3 in Spanish, the word "conditional" should be translated as "condicionado" and not "supeditado", as in the current translation.

13. Mr. FERRARI (Italy) suggested that the phrase he had proposed earlier for insertion in paragraph 7 should be changed to read, "and unless otherwise provided in this text", to cover both paragraph 3 and paragraph 4.

14. Mr. HOWLAND (United Kingdom) and Mr. ABASCAL (Mexico) said they supported the compromise solution proposed by the representative of Italy.

15. Mr. HERRMANN (Secretary of the Commission) said that if Italy's new proposal was adopted, paragraph 7 would state, essentially, that article 12 did not deal with the legal effects of a data message unless it dealt with them. To avoid such an awkward construction, it would be preferable to adopt the original amendment that referred specifically to paragraphs 3 and 4.

16. Ms. REMSU (Observer for Canada) and Mr. PHUA (Singapore) said they supported the inclusion of the phrase "and subject to paragraphs 3 and 4" in paragraph 7.

17. Mr. ZHANG Yuqing (China) said he shared the Secretary's views on the proposed amendment. However, he felt that the paragraph did not add anything of substance to article 12. If the other delegations agreed that paragraph 7 was superfluous, it should be deleted; otherwise, he supported the proposal to refer to both paragraph 3 and paragraph 4 in the amendment.

18. Mr. MADRID (Spain) said he supported the Chinese proposal to delete paragraph 7, since it only reflected the general principle that nothing in the Model Law was intended to impinge on applicable law. It might be more appropriate to include that paragraph in the Guide. If the other delegations wished to retain the paragraph in the Model Law, he supported the proposal to include a reference to paragraphs 3 and 4.

19. Ms. BOSS (United States of America) said that, although the viewpoint of China and Spain was understandable, paragraph 7 should be retained because it indicated that article 12 did not deal with offer and acceptance rules. However, the amendment referring to paragraphs 3 and 4 was unnecessary.

20. Mr. TELL (France) said he did not see the need for paragraph 7, but had no strong objections to retaining it. He agreed with the United States delegation that the proposed amendment was unnecessary, and felt that it could cause problems of interpretation.

21. Mr. FERRARI (Italy) said that, because paragraphs 3 and 4 (b) dealt with the issue of whether or not a data message had legal effects, they must be mentioned in paragraph 7.

22. Mr. CHOUKRI (Observer for Morocco) said he agreed with the Chinese and Spanish delegations that paragraph 7 was superfluous and should be either deleted or moved to the Guide.

23. Mr. SANDOVAL LÓPEZ (Chile) referred to the amendment to article 12; he had proposed the day before and expressed support for the draft of article 12 prepared by the informal working group. As paragraph 7 fulfilled no function, it should be eliminated from the Model Law; a reference to it could be included in the Guide to Enactment of the Model Law (A/CN.9/426).

24. Mr. ABASCAL (Mexico) said paragraph 7, while not essential, would be a useful tool in interpreting the text. It did indeed raise a legal issue, namely, whether or not the message had been received and, thus, whether or not the conditions had been fulfilled. That was different from the legal effects referred to in paragraphs 3 and 4 of the article. The problem seemed to be one of drafting.

25. Mr. SORIEUL (International Trade Law Branch) said the question could not be resolved by a drafting group. He recalled that the first draft of the Model Law had included a provision analogous to paragraph 7, which had later been transferred to the Guide. Ultimately, the Commission must decide whether it would be more appropriate to declare an absence of legal consequences in the Model Law or in the Guide.

26. Mr. TELL (France) said that, despite his earlier remarks, in the interest of compromise his delegation would consider retaining paragraph 7 and adding the phrase "and subject to paragraphs 3 and 4" after "data message".

27. Mr. HOWLAND (United Kingdom) said that in a spirit of compromise, his delegation too, would agree to retain paragraph 7. The Italian proposal and the proposal to include a reference to paragraphs 3 and 4 were equally problematic. Perhaps a viable compromise would be the United States suggestion to place the emphasis on the phrase "apart from establishing receipt of the data message".

28. In fact, the article did not deal with the establishment of receipt of data messages; it merely described two situations where data messages might be viewed as not having been transmitted. It might therefore be more accurate to say at the beginning of paragraph 7, "Apart from the question of whether or not the data message may be treated as having been transmitted, ...". That echoed the language of paragraph 4 (b). However, it was not consistent with paragraph 3, which stated that the data message had no legal effect until the acknowledgement was received. If the amendment proposed by the representative of Japan at the previous meeting was adopted and paragraph 3 was changed to read: "the data

message shall be treated as never having been transmitted ...," paragraph 7 would be consistent with both paragraph 3 and paragraph 4 (b). If, however, the current wording of paragraph 3 was used, the beginning of paragraph 7 would have to be amended to read: "Apart from the question of whether the data message may be treated as having legal effect in certain circumstances ...". It would be neater to change paragraph 4 (b) and deal with the question of whether the message had been transmitted in paragraph 7.

29. Mr. FERRARI (Italy) said that, subject to the amendment proposed at the previous meeting by the Japanese representative, his delegation supported the proposal just made by the United Kingdom representative, which took into account the suggestions made by the Secretary of the Commission.

30. Mr. CHANDLER (United States of America) said that the United Kingdom proposal to use the words "legal effect" in paragraph 7 seemed unduly complicated. The phrase "treated as though it had never been transmitted ...", however, was helpful, since it established a factual effect which avoided direct legal consequences, not unlike the principle of statutory time-limits in contract law. It only remained to deal with the question in the Guide to Enactment in order to ensure that there was no misunderstanding.

31. Mr. PHUA (Singapore) agreed with the United States representative. Without paragraph 7, there would be confusion about the legal consequences of article 12. As the domestic legislation in some countries prohibited statutory interpretation on the basis of a guide, paragraph 7 should be included in article 12 of the Model Law, as it had been in earlier drafts.

32. Mr. HERRMANN (Secretary of the Commission) pointed out that there would be more room to explain paragraph 7 in the Guide than in the Model Law. Another solution might be to refer to transmission rather than receipt in paragraph 7, as the United Kingdom representative had suggested. The other United Kingdom proposal, namely to use the term "legal effect" in the first part of paragraph 7, would simply reintroduce the problem.

33. Mr. BURMAN (United States of America) said that, as long as some delegations, such as that of Singapore, felt strongly about including paragraph 7, it should be retained. The changes in that paragraph proposed by the United Kingdom would improve article 12 as a whole because they would limit the extent to which legal consequences could flow from it. He requested clarification concerning the Japanese proposal made at the previous meeting to reconcile paragraph 3, which referred to legal effects, and paragraph 4 (b), which discussed treating the message as if it had never been transmitted.

34. Mr. SORIEUL (International Trade Law Branch) confirmed that the Japanese proposal had been adopted and that paragraph 3 would be made consistent with the wording of paragraph 4 (b).

35. Mr. ANDERSEN (Observer for Denmark) expressed support for the remarks made by the representative of Singapore. The Commission would probably be prepared to accept a compromise solution if it could be worked out by delegations which had strong feelings about paragraphs 3 and 4.

36. Mr. ZHANG Yuqing (China) expressed a preference for the secretariat's drafting of article 12. The term "legal consequences" was extremely vague and had no place in the article, which dealt exclusively with procedural matters. Paragraph 7 was superfluous, for other paragraphs of the article and indeed every article of the draft Model Law could conceivably have legal consequences. It was not for the Commission to analyse those consequences exhaustively, as States would tailor the Model Law to their own needs.

The meeting was suspended at 11.45 a.m. and resumed at 12.20 p.m.

37. Mr. ALLEN (United Kingdom), supported by Mr. ANDERSEN (Observer for Denmark) and Mr. BURMAN (United States of America) proposed that paragraph 7 should be amended to read: "Except in so far as it relates to the transmission or receipt of a data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt."

38. Mr. SORIEUL (International Trade Law Branch), responding to an inquiry from Mr. LEBEDEV (Russian Federation), read out the text of article 12, paragraph 3, as amended: "Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message is treated as though it had never been transmitted until the acknowledgement is received."

39. Mr. MADRID (Spain) recalled that paragraph 7 had been drafted in order to clarify the reference to "legal effect" in paragraph 3; since that reference had been eliminated in the latest formulation of paragraph 3, and since indirect reference to legal effect continued to exist in other paragraphs, it appeared that paragraph 7 had become superfluous.

40. Mr. CHOUKRI (Observer for Morocco) said that paragraph 7 was clearly superfluous and could be deleted, but if the Commission wished to preserve it, he proposed a clearer reformulation, as follows: "This article has no legal effect other than the legal consequences regarding the transmission or receipt of a data message."

41. Mr. LEBEDEV (Russian Federation) asked for an indication of the Commission's position on the need for paragraph 7.

42. Mr. GRIFFITH (Australia) said his delegation doubted the need for such an indication, as it was clear that Commission members either agreed that paragraph 7 was superfluous, or else felt that it improved the text.

43. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said he agreed with the previous speakers who had expressed the view that paragraph 7 was superfluous. Deletion of that paragraph would bring the formulation of article 12 one step closer to the secretariat's original draft of the article, which dealt more clearly and efficiently with the questions at issue.

44. The CHAIRMAN invited members of the Commission to take an indicative vote as to whether paragraph 7 should be retained.

45. Mr. ABASCAL (Mexico) said that an indicative vote simply indicated the views of the majority, and did not reflect a consensus. The preceding debate had revolved around the need perceived by several delegations for some clarification of the legal effects of article 12, in order to avoid possible misinterpretation of the Model Law. The trend in the Commission toward deleting paragraph 7 appeared to reflect drafting exigencies and not substantive ones, and he proposed instead that the United Kingdom's formulation of paragraph 7 should be accepted, subject to final drafting to be carried out by the drafting group.

46. An indicative vote was taken by a show of hands.

47. The CHAIRMAN said that according to the indicative vote, a substantial majority of the Commission appeared to favour retaining paragraph 7 as formulated by the United Kingdom.

48. Article 12, as amended, was adopted.

49. Mr. ZHANG Yuqing (China) said that the Commission had traditionally adopted articles by consensus, and the adoption of an article by a vote appeared to be unprecedented. The indicative vote had been intended only to provide an indication of the views of delegations on various issues, and not to take decisions on the adoption of articles. He inquired as to whether the vote just taken had been in conformity with the Commission's rules of procedure.

50. Mr. HERRMANN (Secretary of the Commission) said that the Chairman had clearly called for an indicative vote, which did not constitute a formal vote. Indicative voting had been used occasionally in the Commission as a means of saving time in debate once the arguments for and against a given proposal had already been made clear. Such voting remained indicative in the sense that no decision was directly taken thereby. In the vote just taken, the silence of those opposing the retention of the paragraph had been assumed to indicate their willingness to a accept the results, as was a necessary component of the consensus principle. In view of the result of that indicative vote, the matter had been assumed to have been concluded.

51. Mr. BURMAN (United States of America) expressed his delegation's support for the Secretary's comments. Indicative votes were a valid part of the Commission's procedures in that they allowed the Chairman to determine if a prevailing view existed on a matter of debate, thereby allowing the Commission's work to move forward.

52. Mr. ABASCAL (Mexico) said that notwithstanding the Secretary's explanation, the indicative vote procedure remained dangerous. If delegations had fundamental reasons for their positions in matters of debate, it was important to attempt to reach consensus on those matters, and not to impose decisions by a vote. A decision could be taken after the reasons for delegations' positions had been made clear, but a single delegation could have such fundamental objections to a position that consensus was impossible.

53. Mr. RAO (India) said he agreed with the representative of Mexico. He questioned whether the issue had been urgent enough to require a vote of any

kind. If not, it could have been left undecided until other outstanding agenda items had been dealt with. His delegation did not wish to encourage the practice of resorting to any form of voting in the case of model laws or draft notes. It was important to maintain a clear distinction between indicative voting and consensus in the Commission's procedures.

The meeting rose at 1 p.m.

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Twenty-ninth session

SUMMARY RECORD OF THE 590th MEETING

Held at Headquarters, New York,
on Friday, 31 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80706 (E)

The meeting was called to order at 3.05 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 13

1. Mr. SORIEUL (International Trade Law Branch) introduced article 13 of the Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication. Article 13 dealt with the formation and validity of contracts and reaffirmed the principle set forth in article 4, which stipulated that a contract could not be denied validity or enforceability on the sole ground that a data message was used in its formation. Article 13, paragraph 2, provided for possible exceptions to the provisions contained in paragraph 1.

2. Mr. ABASCAL (Mexico) proposed to delete the phrase "unless otherwise agreed by the parties" in the first sentence of article 13, paragraph 1, to avoid confusion with article 10, which already contained a reference to contractual freedom.

3. Mr. SANDOVAL LÓPEZ (Chile) suggested that in the Spanish version of paragraph 1 the word "formación" should be replaced by the word "perfeccionamiento" and that "existencia" and "validez" should be used rather than "exigibilidad" because they were more faithful translations of the English.

4. Mr. BURMAN (United States of America) endorsed the current draft of article 13 as amended by the representative of Mexico.

5. Mr. CHOUKRI (Observer for Morocco) agreed that the content of article 13 was extremely important, but opposed its current wording. He proposed that the first paragraph should be broken up into two paragraphs; the first would correspond to the existing first sentence of paragraph 1 and the second would read "Contracts made by means of the use of data messages would have the same enforceability as contracts originating from the use of other well-known means of communication". The new version would eliminate the reference to any "denial of validity or enforceability."

6. Mr. MADRID (Spain) endorsed the current wording of article 13 with the deletion proposed by the representative of Mexico and the changes to the Spanish version proposed by the representative of Chile. His delegation believed that the essence of article 13 resided in the second paragraph rather than in the first, which reaffirmed the ideas expressed in article 4 and article 10. Paragraph 2 of article 13 enabled States to make specific exclusions in the area of contracting.

7. Mr. TELL (France) endorsed the current wording of article 13, as amended by the representative of Mexico.

8. Mr. ABASCAL (Mexico) disagreed with the changes proposed by the representative of Chile, as he believed the term "perfeccionamiento" in Spanish

referred to the "execution" rather than "formation" of a contract and would change the meaning of the Spanish text.

9. Mr. ALLEN (United Kingdom) favoured retaining the current draft of article 13, including the phrase "unless otherwise agreed by the parties", which was essential to cover the case of master agreements which might stipulate that subsequent agreements could only be concluded by an offer and acceptance in writing. Article 10 did not deal sufficiently with such exceptions.

10. Mr. MASUD (Observer for Pakistan) stressed that the provisions of article 12, paragraph 3, were relevant to the idea expressed in article 13. He therefore proposed that article 13, paragraph 1, should be made subject to the provisions of article 12, paragraph 3.

11. Mr. FERRARI (Italy) favoured the use of the Spanish term "formación", which was consistent with other official texts published by UNCITRAL.

12. In response to the view expressed by the representative of Pakistan, he emphasized that article 13 in no way related to the process of offer and acceptance, but rather to the form an offer or acceptance might take, and was meant specifically to inform a legislator that a contract would be deemed valid even when either the offer or the acceptance was in the form of a data message. He therefore favoured retaining article 13 as drafted and could agree to either the deletion or retention of the phrase "unless otherwise agreed by the parties". None the less he wished to point out that article 10 did indeed cover master agreements, since such agreements did contain an agreement between the parties regarding the communication of data messages.

13. Mr. SORIEUL (International Trade Law Branch) agreed with the representative of Italy that it was necessary to adopt terminology that was consistent with the terminology used in previous documents. It was the work of the drafting group to deal with the various language versions of the text at hand.

14. The CHAIRMAN said that if she heard no further comments she would take it that the majority of delegations favoured adopting article 13 as originally drafted.

15. Mr. ABASCAL (Mexico), supported by Mr. CHOUKRI (Observer for Morocco), Mr. ANDERSEN (Observer for Denmark) and Ms. REMSU (Observer for Canada), said that his delegation had recommended the deletion of the phrase "unless otherwise agreed by the parties", and he believed that, with the exception of the United Kingdom, most delegations supported that proposal.

16. Mr. ADENSAMER (Austria) said that his delegation favoured retaining article 13 as originally drafted, including the phrase "as otherwise agreed by the parties", which was consistent with the idea expressed in article 10 and also highlighted the principle of party autonomy. Moreover, retention of the phrase would in no way harm the purity or clarity of the text.

17. Mr. FERRARI (Italy) said that while his delegation favoured retaining article 13 as drafted, it could also agree with the deletion proposed by the representative of Mexico. In that regard, he stressed that the principle of the

party autonomy was sufficiently covered elsewhere in the Model Law and was in fact a general principle underlying the Model Law.

18. Mr. ALLEN (United Kingdom), supported by Mr. ZHANG Yuqing (China), said that the words "unless otherwise agreed by the parties" should be retained; their retention would do no harm, even though several delegations felt that their deletion would do considerable harm. Article 10 did not cover the case at hand; article 13 was expressed in general terms and applied to any contract, whether or not the parties were communicating by means of data messages.

19. Mr. SANDOVAL LÓPEZ (Chile) agreed with the representative of Mexico that the phrase should be deleted.

20. Mr. ABASCAL (Mexico) said that article 10 applied to situations where the parties were communicating by means of data messages. To retain the phrase under discussion would lead to a narrow interpretation of article 13, whereas the Commission had intended its applicability to be very broad. He drew attention to the comments of his Government on article 13 contained in document A/CN.9/409/Add.1.

21. Mr. SORIEUL (International Trade Law Branch) suggested that those who favoured the deletion of the phrase should explain their position clearly.

22. Mr. BURMAN (United States of America) pointed out that similar phrases were present in article 14. However, while his delegation had initially supported the deletion of the phrase from article 13, he did not see what harm would be done by retaining it.

23. Mr. ABASCAL (Mexico) said that there was a danger that the text might be interpreted in such a way as to make the applicability of article 10 excessively narrow.

24. The CHAIRMAN suggested that that issue could be made clear in the Guide to Enactment.

25. Mr. ABASCAL (Mexico) said that that would be acceptable.

26. Mr. ALLEN (United Kingdom) said that article 10 clearly would apply to the formation of contracts, but only if the parties were communicating by means of data messages. The Commission should adopt a policy of caution and retain the language as it stood.

27. Mr. ZHANG Yuqing (China) said that retention of the words "unless otherwise agreed by the parties" was desirable, since it would give the parties more room for manoeuvre in the formation of contracts.

28. Mr. MADRID (Spain) said that it would be preferable to delete the phrase in the interests of a suitably broad interpretation of article 10, which was not intended to apply only to agreements concluded by electronic means.

29. Mr. ANDERSEN (Observer for Denmark) said that since a number of delegations felt strongly about it, the phrase should be retained.

30. Mr. BISCHOFF (Observer for Switzerland) pointed out that both articles 10 and 13 came under the heading of chapter III; article 10 would therefore apply to articles 11, 12, 13 and 14. In deciding whether the phrase should be deleted, the Commission should bear in mind the impact of such a decision on article 14.

31. The CHAIRMAN suggested that the Commission could agree to retain the phrase, provided that the intended interpretation was clearly stated in the Guide to Enactment.

32. Mr. ABASCAL (Mexico) said that his delegation would submit to the generally held view.

33. Mr. CHOUKRI (Observer for Morocco) supported the remarks of the observer for Switzerland and said that his delegation still supported deletion of the phrase.

34. Mr. LEBEDEV (Russian Federation) said that in the interest of compromise, the phrase should be retained; however, the Commission's report should reflect the widely held view that the phrase was unnecessary. Such a stipulation would be useful when the Model Law was enacted in individual countries.

35. Mr. SORIEUL (International Trade Law Branch) said that the views expressed during the current discussion would be reflected in the Commission's report to the General Assembly and in the Guide to Enactment.

36. Ms. REMSU (Observer for Canada), speaking also on behalf of the Australian delegation, said that it had not been demonstrated that any harm would be done by retaining the phrase. In the interest of compromise, the wording of article 13 should be adopted without any change.

37. Mr. BURMAN (United States of America) said that it would be necessary to return to the matter when the final language of article 10 was discussed. His delegation's interpretation of the relationship between articles 10 and 13 was completely different from that of the delegation of the United Kingdom. It had been the clear intent of the Commission that articles 10 to 14 should cover the autonomy of the parties to contract separately as between themselves, and that fact should be reflected in the Commission's report.

38. Mr. ABASCAL (Mexico) reiterated his earlier comment concerning the excessively narrow interpretation of article 13; that article should not be restricted solely to the formation of contracts.

39. Mr. ANDERSEN (Observer for Denmark) agreed with the point made by the representative of Mexico. However, article 4 already contained wording which should meet that requirement.

40. Mr. BURMAN (United States of America) said that it would be useful to broaden the applicability of article 13 as suggested by the representative of Mexico. He wondered whether the latter could draft appropriate wording to enable the Commission to consider the issue at a later time.

The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.

41. Mr. ABASCAL (Mexico), referring to the point made by the observer for Denmark, said that article 4 recognized the validity of data messages as such; however, article 13 had been included because in practice there were systems which could issue manifestations of will - offers and acceptances - because they had been programmed to do so, without any human intervention. Some delegations had felt that the act of programming a computer was a manifestation of will, others that it was an implied responsibility. His Government had proposed an expansion of the principle of article 13 to other acts which involved negotiable manifestations of will. He therefore proposed the addition of a new paragraph 2 to article 13, with the existing paragraph 2 becoming paragraph 3. The new paragraph 2 would read: "Where a data message is used in a transaction, that transaction shall not be denied validity or enforceability on the sole ground that that data message was used.

42. Mr. FERRARI (Italy) said that his delegation supported that proposal. However, the word "transaction" suggested two parties; it might be better to use the word "communication", to cover such situations as notification regarding non-conformity of goods, which was a unilateral act.

43. Mr. CHANDLER (United States of America) said that his delegation also found the Mexican proposal very useful. In order to meet the concern expressed by the representative of Italy, the words "or other commercial communication" could be inserted after "transaction", so as to cover unilateral statements with commercial and contractual implications.

44. Mr. TELL (France) said that his delegation also supported the Mexican proposal. However, it had difficulty with the word "opération" ("transaction"), which had no legal meaning in French law. The Commission also needed to determine whether it was necessary to change the title of article 13 if its scope was to be expanded.

45. Mr. SORIEUL (International Trade Law Branch) said that for some years there had been problems with the translation into other languages of the word "transaction", but it might be a good idea to conform with past usage. Since the Mexican proposal referred to the validation of manifestations of will by electronic means, a solution might be to use the words "manifestation of will", thereby avoiding problems of terminology.

46. Mr. FERRARI (Italy) said that his delegation strongly supported the suggestion by the representative of the United States of America but would prefer not to use the word "commercial" since article 1, which defined the sphere of application, expressly referred to commercial activities.

47. There would be a problem in using the words "manifestation of will" because in a number of countries notification of non-conformity, for example, was not considered to be a declaration of will, but a declaration of science. The wording suggested by the representative of the United States of America might be the best, since it would cover both types of declaration.

48. Mr. UCHIDA (Japan) said that his delegation was opposed to the inclusion of the new paragraph 2. The term "transaction" covered unilateral legal act; however, as a matter of policy, his delegation did not feel that unilateral legal acts should be included within the scope of article 13. It could be a surprise to the other party if, for example, a cancellation could be made by way of a data message without prior agreement.

49. Mr. ALLEN (United Kingdom) said that his delegation would not oppose the inclusion of a paragraph along the lines suggested by the representative of Spain. It felt that the word "communication" was better than "transaction", especially if it was more acceptable in jurisdictions in which the word "transaction" had no clear legal meaning, and would prefer "communication" to "manifestation of will", although if there was general support for the latter formulation his delegation would not oppose it.

50. The proposed new paragraph was more akin to article 4 than to the provisions in chapter III. Like article 4, the new provision was entirely general: it applied to unilateral communications, not just cases in which parties were communicating by means of data messages on both sides. It would therefore make more sense for it to be included as a separate provision after article 4, because the intention was to ensure that the requirements for writing and other formalities did not have a restrictive effect which would prevent validity being given to expressions of will by means of data messages. If the new paragraph was included in chapter II, it would be necessary to ensure that article 13, paragraph 2, applied to it.

51. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation supported the Mexican proposal. However, the word "transaction" had an economic rather than a legal sense, and his delegation would prefer "manifestation of will".

52. Mr. ABASCAL (Mexico) said that his delegation's original proposal, reproduced in document A/CN.9/409/Add.1, used the term "manifestation of will", but it seemed that some delegations found that wording too broad. As to the difficulties associated with the use of the word "transaction", because international trade law instruments needed to be uniformly adopted, it was sometimes necessary to move away from traditions and precise meanings of terminology in individual legal systems. His delegation would have no difficulty with the suggestion put forward by the representative of the United States of America.

53. Mr. ZHANG Yuqing (China) said that the word "transaction" referred to the sale of goods, from the making of offers to payment, while article 13 referred only to "contract formation", although that could include transport, insurance and banking enterprises, and other parties, which would complicate the Commission's work. The terms "communication" and "manifestation of will" could have many different meanings. Article 1 referred to "any kind of information", which already included all those meanings. The use of the word "transaction" would then extend the scope too much. His delegation therefore suggested that the Commission should return to the secretariat's version of article 13, rather than spending more time on the word "transaction".

54. Mr. CHOUKRI (Observer for Morocco) said that his delegation felt that the first version of article 13 was clearer than the new version. Article 13 referred to "contract formation", and a transaction was only one part of that process. "Enforceability" and "validity" referred to contracts; in manifestations of will, there must be no error and no coercion. The word "transaction" had a commercial, not a legal meaning, and was very broad; article 13 was concerned with the validity and enforceability of contracts, not transactions.

55. Mr. TELL (France) said that it was necessary to determine what was meant, in the legal sense, by "commercial communication", which could, for example, mean either advertising or an offer, in which case paragraph 1 applied. Article 4 referred to "information" in general. To some extent, the hypothesis of a commercial communication was already covered by that article. The word "transaction" generally meant a contract, or an offer, which was covered by article 13, paragraph 1. It might be better to use the words "manifestation of will" or "legal acts", which would include contracts.

56. Mr. MADRID (Spain) said that the Commission must decide whether there was any advantage in including the new paragraph. It had been felt that in some situations, article 4 was not sufficient to cover the possibility of using data messages for information. The new paragraph must embody the idea of manifestation of will, but should not overlap with paragraph 1 (offer and acceptance of an offer). Since the word "transaction" posed problems, his delegation preferred "manifestation of will"; "legal acts" could be too technical in some legal systems, and too imprecise in others.

57. Mr. FERRARI (Italy) said that article 13, paragraph 1, covered both offer and acceptance and was therefore applicable to all contracts. He suggested embracing the spirit behind the Mexican proposal and inserting the word "communication", as suggested by the United States delegation. The terms "legal act" and "declaration of will" should not be used for similar reasons. He proposed that the new paragraph 2 should read "Any communication shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message." That would bring it into line with the wording used in article 4.

58. Mr. UCHIDA (Japan) said that if the new paragraph 2 was adopted, a party to a contract could cancel the contract without any prior agreement, to the surprise of the other party.

59. Mr. FERRARI (Italy) said that the only new point that the proposed new paragraph would add to contract law had to do with whether the data message could be used. No one could be surprised by receiving a notification of cancellation because the right to void or cancel a contract was either permissible under the applicable law or it was not.

60. Mr. ABASCAL (Mexico), referring to the concern raised by the representative of Japan, said that a contract could indeed be considered to be terminated in the spirit of the proposal. If the Model Law did not contain a clear stipulation that a contract could not be changed or ended except in writing, a contract could be considered terminated by means of an electronic message or an

EDI message and yet there could still be doubt as to whether the notification was a manifestation of appropriate will. The proposal was intended to make clear that such manifestation of will existed. He was not opposed to the use of "manifestation of will", which were the very words used by the Government of Mexico in its original observations. He had changed the term at the suggestion of a number of delegations who had felt it might be too broad.

61. Mr. ZHANG Yuqing (China), referring to the suggestion of the representative of Italy to replace the word "transaction" by the word "communication", said that the meaning of the latter term in Chinese could be very confusing. In fact, it had no legal meaning in his language. As his delegation saw it, letters, telephone calls and facsimile messages were all forms of communication, which was a tool for transmitting information. If the word was understood to mean information, then a separate provision would be required.

62. Mr. LEBEDEV (Russian Federation) said that the serious problem raised by the representative of Mexico appeared to be covered by article 4 of the Model Law. If that was not the case, and the proposal by the representative of Mexico to use the term "communication" or "statement" was accepted, a separate paragraph in article 13 would not be necessary. The words "the same rules apply to communication or statements of the parties" could be added to that article, bearing in mind that such communications or statements might be made by data message, a mode of transmittal that did not, in fact, affect their legal validity or enforceability. That would be the best way to solve the problem in paragraph 1, although, as noted by the representative of France, the title of article 13 would have to be changed.

63. Expressions such as "statement" and "communication" on the one hand and "information" as used in article 4 on the other hand, reflected concepts which were basically identical. Over and above the difficulty of interpreting the concept of "communication" in itself, there was the additional problem of distinguishing between "information" as defined in article 4 and "communication" as the term would be used in article 13. Furthermore, it was very clear that terms such as "communication" and "statement" in article 13 would have to be subject to the rules set out in articles 5, 6 and 7 of the Model Law. If the proposal of the representative of Mexico was to use the term "communication" rather than the term "manifestation of will", then there would be no need to supplement the existing text; the problem was settled in article 4 by the word "information", which seemed to have a fairly broad meaning in order to encompass very different situations.

64. Mr. SORIEUL (International Trade Law Branch) said that the problems being encountered at the current meeting were no doubt linked to the redundancy between the provisions of article 4 and article 13. Once an exception had been made for contracts, it was logical that a proposal to expand the recognition of the validity beyond the scope of contracts to a set of acts by which a party might be led to produce legal effects by electronic communication should be put forward. Additional effort would be required to define the precise context of the concept that was intended to enjoy the same treatment as contracts, for if the Commission intended to use vague non-legal concepts such as "operation", "transaction" and "communication", then specific definitions of those concepts as used in the Model Law would have to be formulated. The authors of the

proposal and the delegations supporting it should draw up a list of three or four legal concepts which the Commission wished to have recognized in the context of article 13. If the Commission decided that it would be useful to include such a provision, the link between the new paragraph and paragraph 1 could then be determined.

65. Mr. FERRARI (Italy) said that his delegation had suggested the use of the word "communication" precisely because the term did not have specific legal meaning - it was neutral and sufficiently vague, in keeping with the international character of the Model Law, and prevented the introduction of new concepts which would only create more confusion. A similar approach had been used in other uniform UNCITRAL texts, such as the United Nations Convention on Contracts for the International Sale of Goods. Indeed, all the arguments adduced by the representative of China tended to justify the use of the word "communication".

66. Mr. ABASCAL (Mexico) said that it was indeed quite difficult to explain and justify the difference between article 4 and article 13. However, his delegation was actively seeking to resolve that problem. He agreed with the representative of Italy as to the use of legal terms. Concerning documents on uniform law, the use of legal terminology, which had very specific connotations in domestic systems, might have results that were opposite to the ends sought in formulating uniform law. He suggested that the word "statement" should be used instead of "transaction" or "communication".

67. Mr. CHANDLER (United States of America) said that the term "manifestation of will" appeared to enjoy a consensus and that, since it suited the purpose for which it had been proposed, the Commission should concentrate on it.

68. Mr. ZHANG Yuqing (China) said that article 13, paragraph 1, on formation and validity of contracts, would suffice. The Mexican proposal would extend its scope to include implementation and all other related issues. However, extending the scope of the article without a comprehensive debate beforehand might be hasty. If his memory served him right, communication dealt with form, namely, the will of one party expressed through writing to the other party. However, article 13 dealt not only with form but also with types of contracts expressed through the transmission of a data message. The article's function would be totally different from that of article 27. While he was not against expanding the scope of the article, he agreed with the representative of the secretariat on the need to limit such expansion.

The meeting rose at 6.05 p.m.

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Twenty-ninth session

SUMMARY RECORD OF THE 591st MEETING

Held at Headquarters, New York,
on Monday. 3 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80718 (E)

The meeting was called to order at 10.15 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) A/50/17; A/CN.9/409/Add.1; A/CN.9/426)

Article 13 (continued)

1. Mr. FERRARI (Italy) said his delegation strongly opposed the use of the words "manifestation of will" in the wording proposed by Mexico for paragraph 1 of article 13.

2. The CHAIRMAN said that while the Commission appeared to have accepted the wording proposed by Mexico, the final version of the text and heading of the article would be formulated by the drafting group.

3. Mr. ABASCAL (Mexico) drew attention to the difference between article 13 and article 4, which stated that "information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message".

4. Mr. MASUD (Observer for Pakistan) said article 13 had been intended to deal with the entire process of contract formation. As currently formulated, however, the article covered only the making and acceptance of an offer, and not with the equally essential matter of the entry into effect of that offer or of its acceptance. Since article 14, paragraph 2 (a), stipulated that "receipt occurs at the time when the data message enters the designated information system", problems could arise if the addressee did not immediately become aware of the message's arrival in that system. The article should therefore be given further careful consideration.

5. Mr. ZHANG Yuqing (China) agreed that article 13 required further consideration, because the proposed changes in its wording would appear to imply or require expanding its scope beyond contract formation; his delegation was firmly opposed to such an expansion.

6. Mr. SORIEUL (International Trade Law Branch) said the Commission had already concluded its discussion of article 13, but perhaps a new article could be formulated to deal with the handling of manifestations of will or other statements conveyed by means of data messages.

7. Mr. BURMAN (United States of America) said such terms as "manifestations of will and other statements" could be clarified by explicitly relating them to more specific terms, such as "performance". The article's scope would thereby be extended beyond contract formation, but not to an excessive degree.

8. Mr. CHOUKRI (Observer for Morocco) said a manifestation of will was only binding upon the party manifesting or expressing that will. He therefore suggested a clarification of article 13, paragraph 1, that would allow offers and acceptances to be expressed by means of data messages in the context of manifestations of will.

9. Mr. LEBEDEV (Russian Federation) pointed out that articles 4 and 13 of the draft Model Law were similar in content and wording.

Article 11

10. Mr. SORIEUL (International Trade Law Branch) recalled that questions had been raised at the Commission's twenty-eighth session with regard to the applicability of article 11 to telegram, telecopy and telex messages, as well as the criteria for ascertaining the authenticity of a data message in the context of telegrams or telex. The Commission had decided to reconsider the inclusion of article 11, subparagraph 3 (a) (ii), in view of the possible legal consequences it entailed; moreover, no decision had been taken on article 11, paragraph 6. The Commission had also agreed to delete the previous draft paragraph 8.

11. Mr. SCHNEIDER (Germany) said article 11 constituted the core of the Model Law; any changes to it required careful consideration of its underlying principles, as well as of its consequences. Article 11, subparagraph 3 (a) (ii), as currently formulated, could endanger international commerce by placing too heavy a burden on the addressee of a potentially falsified message, and should therefore be deleted.

12. Mr. BURMAN (United States of America) said that, although his delegation had previously favoured retaining the original language of that subparagraph, it had consulted many experts in the commercial and data-exchange fields and had changed its position to that just expressed by the representative of Germany. Retaining that subparagraph would not work in the marketplace, and could jeopardize the use of the Model Law. His delegation therefore joined Germany in urging that it be deleted.

13. Mr. ABASCAL (Mexico) said his delegation, too, agreed with the proposal to delete subparagraph 3 (a) (ii), which had similarities with the Model Law on International Credit Transfers, in that a message could be attributed to the originator only on the basis of some previously agreed procedure for authentication. When article 11 had been drafted, it had seemed to apply to open electronic-data interchange; the provision regarding "reasonable circumstances" should allow for authentication without prior agreement, but if it would cause problems it would be preferable to delete it.

14. Mr. FERRARI (Italy) said his delegation also favoured deletion of subparagraph 3 (a) (ii), but consideration must then be given to the fact that ways of ascertaining whether a message was that of the originator would, consequently, be very limited.

15. Mr. ANDERSEN (Observer for Denmark) suggested that, in subparagraph 3 (a) (i), "or" could be replaced by "and", to make it clear that prior agreement as such was not the entire basis for relying on the data message.

16. Mr. MADRID (Spain) said his delegation shared the concerns expressed by previous speakers and supported the proposed deletion of subparagraph 3 (a) (ii) to ensure greater certainty in commercial transactions. Article 11,

paragraph 2, was ambiguous. Some delegations saw a necessity for prior agreement among the parties; Denmark had just pointed out the need to place a further restriction on attribution. His delegation nevertheless believed that article 11, paragraph 1, was sufficiently broad to allow anyone with an inter-computer communications system to conclude a contract with a third-party service provider and take as authentic messages received from that third party. Contracting parties could also agree on a third-party service provider, but it should be made clear whether that possibility would be covered in the article or should be discussed in greater depth in the Guide to Enactment of the Model Law. Some uncertainty also remained regarding the extent to which prior agreement was needed. Assurances and security should be provided, but restrictions should not be imposed.

17. Mr. GOH (Singapore) said he supported the deletion of subparagraph 3 (a) (ii), but did not agree with the suggestion of the observer for Denmark which, in his view, would lead to greater uncertainty.

18. Mr. TELARANTA (Finland) said he supported the suggestion of Denmark.

19. Ms. REMSU (Observer for Canada) said both the proposal of Germany and the suggestion of Denmark would confine the interchange to the relationship between the originator and the addressee. Her delegation preferred the proposal to delete paragraph 3 (a) (ii).

20. Mr. MASUD (Observer for Pakistan) said once an agreed procedure had been followed, further authentication was not necessary because of the autonomy of the parties. Therefore, his delegation opposed the suggestion of Denmark.

21. Mr. ABASCAL (Mexico) said there seemed to be general agreement that subparagraph 3 (a) (ii) should be deleted. The Danish suggestion would make the text of article 11 parallel to the text of the Model Law on International Credit Transfers, which required prior agreement on an authentication procedure. That Model Law identified authentication as a procedure established by agreement between the parties to determine whether a message actually was issued by the person indicated as the sender. It also expressly stated that no procedure could be agreed upon that was not "reasonable in the circumstances". The Danish suggestion varied somewhat, however. Article 11, as part of chapter III, would be subject to "variation by agreement" (article 10). In his opinion, the system in the Model Law on International Credit Transfers was more secure, since article 11 of the draft under consideration was quite restrictive for the originator. In the Model Law on International Credit Transfers, the agreement was arrived at between the originator and the addressee, but that was not the case in article 11.

22. Mr. SCHNEIDER (Germany) said it should be left to the parties to decide on procedures; therefore, he did not support the Danish suggestion. The purpose of article 11 was to determine which party bore the risk when sending a data message. It was never really clear how the term "reasonable" would be interpreted, and therefore, the use of that term added an element of uncertainty.

23. Mr. BURMAN (United States of America) said his delegation associated itself with the comments of Spain, Singapore and Pakistan regarding the Danish suggestion. The default rules provided for the allocation of risk and it was not appropriate to subject the mechanism to further judgement. The point raised by Spain was well taken, and should be incorporated in the draft. Agreements regarding procedures leading to a more open system of interchange should be a priority for the future work of the Commission.

24. The CHAIRMAN said there appeared to be a consensus that article 11, paragraph 3 (a) (ii), should be deleted and that the Danish suggestion should not be adopted. The point raised by Spain should also be incorporated in the draft.

25. Mr. ANDERSEN (Observer for Denmark) said it had not been his intention to place restrictions on the way in which procedures were agreed upon, but he could accept the Commission's view regarding his proposal.

26. Mr. CHOUKRI (Observer for Morocco) said his delegation did not share the misgivings expressed concerning paragraph 3 (a) (ii), which provided a mechanism based on efficiency, speed and confidence. It concerned commercial transactions between two parties known to each other, and, if an error was made, civil law provided penalties and a way to end the contract.

27. Mr. BISCHOFF (Observer for Switzerland) noted that article 11 referred to a reasonable procedure, rather than a reasonable method, as in the Model Law on International Credit Transfers.

28. Mr. BAUM (Observer for the International Chamber of Commerce) said he was concerned that the deletion of subparagraph 3 (a) (ii) would have a negative impact on the broader goal of fostering open trading, for example on the Internet, when no prior agreement existed between the parties. Some delegations had seen the deleted subparagraph as fostering such trade. The underlying problem appeared to be that of ensuring that the communication was sufficiently secure. Terms such as "reasonably secure" or "properly secure" might meet that concern.

29. Mr. TELL (France) said the Model Law under discussion would apply to such means of communication as telecopy, telex, electronic mail and the Internet. He wondered whether article 11 had any legal meaning stricto sensu in the case of a telecopy, where the originator could be determined. Perhaps the Guide should contain some discussion regarding the contractual relationship between the parties in such cases.

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

30. Mr. LLOYD (Australia) said the words "as its own" at the end of subparagraph 3 (b) were ambiguous and should be replaced with the phrase "to impersonate the originator".

31. The CHAIRMAN said the Commission did not appear to support that proposal.

32. Mr. CHANDLER (United States of America) pointed out that the reference to paragraph 3 (a) (ii) in paragraph 4 (b) would have to be deleted, and asked whether paragraph 6, which was in square brackets, would be retained.

33. Mr. HOWLAND (United Kingdom), supported by Mr. SCHNEIDER (Germany), proposed that the square brackets should be deleted and that paragraph 6 should be adopted as currently drafted.

34. It was so decided.

35. Mr. BURMAN (United States of America) said paragraph 2 should be redrafted so that it covered actions taken by third-party service providers. He proposed that the phrase "communicated by a person" should be replaced with "communicated by or on behalf of a person".

36. Mr. SORIEUL (International Trade Law Branch) said the resulting repetition of the phrase "on behalf of" could be confusing. The drafting group would decide how to incorporate the United States proposal into paragraph 2.

37. Mr. ALLEN (United Kingdom) proposed that the phrase "or by an information system operated by or on behalf of the originator" should be added at the end of paragraph 2 so that the provision would cover automatic messages.

38. The CHAIRMAN said the secretariat took note of the proposal, but that the drafting group would determine the final wording of the paragraph.

39. Mr. LLOYD (Australia) said the word "transmit" in paragraph 5 should be changed to "communicate", which was the term used in the rest of article 11.

40. Article 11, as amended, was adopted.

Article 14

41. Mr. FERRARI (Italy) said there was a conflict between paragraphs 1 and 2 of article 14, since the definition of the time of dispatch was identical with that of the time of receipt.

42. Mr. SORIEUL (International Trade Law Branch) said the Italian representative's observation was correct, but he saw no conflict between those paragraphs. When two parties communicated directly, the dispatch and the receipt of a data message were virtually simultaneous. Thus, a data message was considered to have been dispatched when it could no longer be changed by the originator, i.e., when it entered an information system to which the originator did not have access.

43. Mr. ABASCAL (Mexico) said the Working Group had concluded that the only time when a data message could be objectively deemed to have been sent was when it had entered a system other than that of the originator, whether the system belonged to the addressee or to an intermediary.

44. Mr. ZHANG Yuqing (China) said that, in the first sentence of paragraph 4, the order of the two phrases following the comma should be reversed so that the

place of dispatch was mentioned before the place of receipt. That would be more logical, since a data message had to be dispatched before it could be received, and the word "dispatch" appeared before "receipt" in the title of article 14.

45. Mr. HOWLAND (United Kingdom) said the text of article 14 represented a compromise reached in the Working Group and it would be preferable not to reopen the debate on the substance of the article. However, he wished to propose two minor drafting changes. In paragraph 3, the words "deemed to be" should be inserted before the word "received" to reflect the wording of paragraph 4. In subparagraph 4 (b), the words following the comma should be replaced by "the place of its habitual residence is to be regarded as its place of business".

46. Mr. SORIEUL (International Trade Law Branch) said that, although the wording of paragraph 4 (b) was not very precise, it was taken directly from article 10 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) and should not be changed for less than compelling reasons.

47. Mr. MADRID (Spain) said he was concerned about the exceptions to the applicability of paragraph 4 which were provided for in paragraph 5. Under paragraph 4, the parties to a contract could agree to change the place where the contract was deemed to have been concluded for procedural and jurisdictional purposes, irrespective of any objective or pre-existing criterion. That could interfere with public procedural and jurisdictional regulations because, in the event of litigation related to the contract, the parties could decide to change jurisdictions in order to avoid certain courts.

48. Mr. FERRARI (Italy) said his delegation wished to draw attention to certain consequences of comparison between dispatch and receipt of messages. Countries where a contract was concluded on the basis of the theory of expedition or mailbox rule were currently governed by the rules of reception. For example, article 16 of the Vienna Sales Convention stipulated that an offer could not be revoked once acceptance of it had been dispatched.

49. Mr. SORIEUL (International Trade Law Branch) referring to the comparison with the mailbox rule, said it was simply a matter of considering that the mailbox in such cases would be a system belonging to a third party who owned the network. The originator was deemed to have entrusted his message to the owner of the network through which he sent his message. More rarely, in cases where the parties possessed a system that enabled them to communicate directly, the time when the message was sent out and the time it was received directly coincided. The Working Group had decided that in such instances the instantaneous nature of the transaction would rule out extending the period during which a contract could be withdrawn or modified.

50. Mr. FERRARI (Italy) said in order for a contract to be concluded under the mailbox rule, it was not necessary for the relevant message to reach its destination. In the rule currently under discussion, the message actually had to reach its destination.

51. Mr. SORIEUL (International Trade Law Branch) said when a third party was used to carry a message between an originator and a recipient, it was assumed

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that the system worked and that the mailbox was open. In the current instance, the message was deemed to have been sent out once it had left the originator's control; strictly speaking, it was immaterial whether or not the message actually reached the addressee. The same criterion, that of a message actually entering the system, also applied to messages sent directly from one party to another without intermediaries. A genuine difficulty did arise, however, in cases where an addressee deliberately chose to switch off his system, thus precipitating a conflict between the mailbox rule and the rule currently under discussion.

52. Mr. CHANDLER (United States of America) said the mailbox rule, which applied to the regular mail, was not adequate to deal with the commercial realities of electronic communication. Dispatch by the originator did not necessarily mean that the message had been transmitted into the overall system. Many systems batched messages and did not send them out until a certain number had accumulated. A more reliable criterion was receipt by the addressee's system, a criterion which the United States was beginning to adopt. The informal working group had therefore made the proper decision.

53. Mr. MASUD (Observer for Pakistan) said that, in article 14, paragraph 2 (a), a distinction must be made between the ordinary transmission of data messages through electronic means and actual knowledge of the addressee as the essence of the transaction. In many cases, legal consequences could flow from the latter and not merely from the transmission of data into an information system. He therefore proposed amending the article by adding, after "designated information system", the words "except when actual knowledge of the addressee is an essence of the transaction". The word "but" would then have to be deleted.

54. Mr. CHOUKRI (Observer for Morocco) suggested deleting paragraph 5 on administrative, criminal or data protection law, as it was totally unrelated to paragraph 4.

55. Mr. HOWLAND (United Kingdom) said he agreed with the United States representative that article 14 was a tailor-made adaptation of the rule of receipt, which was well suited to modern electronic communication. He shared the concerns of the Pakistani representative but felt they were already addressed in paragraph 2 and also by the content of article 10.

56. Mr. TELL (France) said he was pleased that, as his delegation had requested, article 14, paragraph 4, would not attempt to impose any rules concerning conflict of laws.

57. Mr. UCHIDA (Japan), referring to paragraph 1, asked when a data message would be considered to occur in a situation where the originator entered the message into his own system and it was later accessed and retrieved by the addressee's information system.

58. Mr. SORIEUL (International Trade Law Branch) said the timing would be determined in the agreement between the parties. Probably, the message would occur when the addressee searched for it in the originator's system.

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59. Mr. ABASCAL (Mexico) said it was more likely that the message would occur when the addressee actually retrieved it, for it would then be in a system other than the originator's.

60. Mr. BURMAN (United States of America) said he agreed with the United Kingdom representative that article 14 was well balanced and that the concerns of the Pakistani delegation might already be addressed in the Model Law. He also supported the Spanish and Moroccan statements concerning paragraph 5, which his delegation had never found to be necessary.

61. Mr. LEBEDEV (Russian Federation) said the experts in his country had felt that paragraph 1 meant that a message was dispatched when it left the originator's information system, which was contrary to the conclusion of the Working Group. However, the Guide to Enactment (A/CN.9/426) seemed to indicate in paragraph 107, that dispatch and receipt were virtually simultaneous except where an information system had not been specifically designated by the addressee.

62. Mr. DONG Yi (China) inquired why paragraph 4, on place of receipt, was limited to computerized transmission. He noted that, in document A/CN.9/406, paragraph 49, the Working Group expressed concern that the provision might not cover telexes and telegrams. He wondered, however, whether it was applicable to telecopies, particularly when sent through a mobile phone and, in such a case, how the place of receipt of the data message was determined.

63. Mr. ABASCAL (Mexico) drew attention to situations where the originator, using a third-party provider service, dispatched a message which could not be forwarded to its destination. In such a case, the originator had complied with the dispatch rule but his responsibility regarding retransmission of the data message had yet to be determined. The Pakistani proposal was covered by the rule of information, not the rule of receipt. Under contract law, the message occurred when the addressee became aware of its content.

64. Mr. SORIEUL (International Trade Law Branch) said he could offer only a partial response to the Chinese delegation. Paragraph 4, as worded, did not apply to telexes and telegrams. The extent to which it covered telecopies was unclear, for telecopies could be transmitted electronically but also by other means. It was for the Commission to decide whether the paragraph covered telecopies.

The meeting rose at 1.05 p.m.